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# The Settlement of Investment Disputes between States and Private Parties

## *An Overview from the Perspective of the ICC*

Horacio A. GRIGERA NAÓN\*

### INTRODUCTION

In the last twenty years or so, the flow of investment across frontiers has by far exceeded the international flow of goods and, more generally, international trade flows. The globalization of the world economy in more recent years has emphasized even more a trend that had already taken firm roots.

The growth of foreign investment has been accompanied (perhaps one could say triggered) by a Copernican change in the attitude of host countries—particularly, but not exclusively, in the developing world—regarding the treatment and level of protection to be afforded to foreign private investment. From positions clearly adverse—for example, to granting foreign investment national treatment, treatment in compliance with minimum international law standards or most-favoured-nation treatment and other guarantees relating to money transfers, the payment of dividends or the payment of compensation which was the case prevailing in the 1960s and 1970s—developing countries have generally shifted in more recent years towards positions favouring the grant of that type of protection or guarantee. In parallel, such countries have shown willingness or agreed to drop certain requirements imposed on foreign investors, such as a national presence on the Board of Directors or in the share capital of foreign-owned companies, or the satisfaction of performance requirements or export quotas. Since an integral part of the protective framework required by private investors and espoused by industrialized countries—such as the United States—includes access by the private investor to international commercial arbitration to resolve claims against the host country arising from its status as such or from the foreign investment, the new attitude of developing countries has also been evidenced through their acceptance to submit to binding arbitration should the private foreign investor opt for that means of dispute resolution to obtain redress for his grievances. Such an acceptance is granted in advance and becomes operational (normally before the dispute has arisen) as soon as the legislation or the applicable international agreement incorporating such acceptance is, as

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the case may be, passed or ratified by such State or ratified by the State of origin of such foreign investor (arbitration without privity).

Such developments have been mainly embodied either in legislation (e.g. foreign investment laws) passed by host countries or in multilateral (e.g. the Energy Charter Treaty), minilateral, plurilateral (e.g. North American Free Trade Agreement (NAFTA) Chapter 11) or bilateral (e.g. bilateral investment treaties (BITs)) international treaties or agreements ratified by different countries. Not too long ago, the World Bank estimated that 1,100 BITs<sup>1</sup> involving both developing and developed countries (a substantial number of them entered into exclusively between developing countries), which refer to international commercial arbitration as one of the possible dispute settlement options available to the private investor to handle its claims against the host State, had been concluded. By now, this figure has certainly grown substantially.

The proliferation of this wide variety of legal instruments regarding the protection of foreign investment raises a number of important questions, both in connection with the level of protection to be afforded to foreign private investment and investors in host countries and the methods for the settlement of disputes between States and private parties arising out of foreign investment. Both aspects actually interact reciprocally. For example, if this kind of dispute is to be handled by international dispute resolution panels, it is more likely that the development of substantive law rules and principles enjoying wide international recognition and consensus will be facilitated because of the independence, delocalization and cultural neutrality of such mechanisms.

In this connection, international dispute settlement mechanisms are expected to provide a legal and technical—instead of a political—approach to the resolution of disputes regarding foreign investment. By advancing the resolution of disputes through the furtherance of principles of justice rather than political accommodation (which may, of course, be pursued in parallel by other means) private international dispute resolution devices provide a better technical and appropriately depoliticized framework for the development of substantive law and principles regarding foreign investment protection likely to enjoy wide international consensus.

In any case, it would be a serious mistake to forget their reciprocal interaction when considering the dispute resolution or the substantive law aspects of foreign investment protection. The purpose of this article will, however, primarily be to deal with the former as expressed in international agreements. No specific analysis will be made of national legislation on foreign investment unilaterally providing for international means for the resolution of disputes involving foreign investors and the host State. Some reference will, however, be made to the impact of the chosen dispute settlement mechanism on the applicable substantive law.

Among the substantive law questions, the elucidation of which will depend on whether an international dispute resolution mechanism is to apply, are the following:

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<sup>1</sup> See A. Parra, *Provisions for the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID Review-Foreign Investment Law Journal 287, 1997, at 290.

- do these new trends already constitute or evidence new international or transnational law rules and principles governing the substantive and dispute resolution aspects of the relationship between the host State and the private investor?
- for the time being are these trends just the harbinger of a new international legal order in the making in this area? or
- are these trends merely limited to setting aside or eroding certain principles or doctrines (e.g. the Calvo doctrine) without thereby introducing in their place and stead contrary or opposite principles enjoying world-wide consensus?

In the first two cases, one would be really facing new international law, either already constituting a set of rules or principles or evidencing an incipient stage of their formation premised upon the progressive identification of such rules or principles as showing in bilateral and minilateral international agreements and, to a lesser extent, investment laws or codes unilaterally enacted by different States providing for foreign investment and investor guarantees and commercial arbitration for the resolution of business disputes arising out of any breach of such guarantees. The foregoing poses, of course, the question of the qualitative importance to be ascribed to these developments in the formation of a new international or transnational law or of general principles of law enjoying international consensus regarding foreign investment protection, not only affecting the applicable substantive law but also concerning the dispute settlement mechanisms available, or which should be made available, for resolving any potential disputes originated in the application of this new “law”.

In the last case, we would be facing a neutral legal vacuum to be filled either through one-off negotiations of States and the exercise of their treaty making powers within a bilateral, minilateral or plurilateral context, or even through the unilateral adoption of legislation regarding foreign investment and the settlement of disputes arising therefrom. Or the vacuum might be filled through multilateral negotiations, which would possibly be more likely to give rise to a new international investment law truly enjoying wide international consensus.

Whatever the case under consideration and the relative importance of different legal sources in the formation or restatement of rules and principles prevailing or to prevail in this legal field, the diversity of protagonists involved also raises the question of whether it is appropriate to abandon the formation or firming up of such new rules or principles in such a vital area to the disparate or isolated negotiations originating bilateral or even minilateral or plurilateral treaties—often involving players of different economic or political might or legal or negotiating sophistication. Perhaps it would be more appropriate to have these negotiations take place on a multilateral basis, within the larger context, for example, of the United Nations, the World Trade Organization (WTO) or the Organisation for Economic Co-operation and Development (OECD), in which case not just South-North, but also North-North issues which may arise between a private investor and a host State are to be dealt with or where traditionally South-

North issues may be revisited or looked at anew from the perspective of North-North concerns regarding not only the interests of the investment exporting sectors of developed States but also of sectors of such States affected by foreign investment inflows or other social sectors in developed States more indirectly concerned with investment flows in one sense or another.

Thus, the participation in the negotiations of developed countries as a potential host State (not just as country of origin of an investor or holder of an investment)—most of whom are organized on the basis of long or proven democratic traditions—may facilitate bringing into the picture ideas advanced in or from such countries by different interest groups or public opinion at large. These views might not necessarily represent the views of such country's investment exporting or importing sector which might not be otherwise sufficiently or articulately represented by or brought to bear on the State officials at and behind the negotiations table if the latter were not carried out within a broad multilateral context, or which otherwise would risk not being properly envisaged.

From a less ambitious perspective, such treaties may also play the role of establishing maximum limitations on the type of concessions which may be unilaterally granted by States in their bilateral arrangements, thus providing a ceiling for the special legal status, including dispute resolution facilities, a private investor from a contracting country may have access to within the context of bilateral or minilateral negotiations undertaken by its country of origin, with prospective host States being a party to treaties establishing such type of ceilings.

Historically, this has been a method propounded and sometimes implemented within the context of regional economic co-operation projects in the 1970s and 1980s in Latin America and Africa. It was inspired by the protectionist policies prevailing at that time in order to unify external policies regarding, *inter alia*, the admission and regulation of foreign investment and the creation of and access to the privileged status reserved to regional multinational corporations and persons or entities investing or having an interest in such corporations, which also included a number of tax, credit and market access advantages.

A recent example in this respect is the Buenos Aires Protocol of 1994, entered into within the context of MERCOSUR by Argentina, Brazil, Paraguay and Uruguay. This Protocol introduces common rules with the express objective of establishing the maximum level of concessions regarding the protection of foreign investment that may be granted by a MERCOSUR country for the protection of foreign investment under international agreements or legislation which, as the case may be, is entered into or enacted by a MERCOSUR country with or *vis-à-vis* non-MERCOSUR countries (Articles 1–2 of the Buenos Aires Protocol). Among other things, this Protocol provides for international commercial arbitration, either institutional or *ad hoc*, for the settlement of investment disputes arising between a MERCOSUR host country and a non-MERCOSUR country foreign investor as one of the dispute resolution options available to the latter. However, the Buenos Aires Protocol does not identify the arbitral institutional or *ad hoc*

options under which the private investor claim may be heard (Section 2(H)(2) and (3) of the Buenos Aires Protocol), since this Protocol only provides a ceiling on the scope of protection to non-MERCOSUR country investors that may be granted, for example, under the discrete investment treaties each Member country may conclude with non-MERCOSUR countries and does not give rise to any specific rights from non-MERCOSUR country investors to claim rights directly arising from this Protocol.<sup>2</sup>

The discussion of such matters, including the choice of the appropriate dispute settlement mechanisms, within the broad multilateral context and under the umbrella of recognized international fora eliciting the world-wide participation of sovereign States in the debates and negotiations, should not only contribute to the legitimacy of the new international or transnational law or set of widely recognized principles of law regarding transnational investment resulting from such multilateral negotiations (or of the existing international or transnational investment law and principles identified or restated through such international agreements), but also facilitate the in-depth analysis of the different economic and legal issues involved from a broad comparative perspective and help to attenuate the impact of constraints originated in this or that discrete economic or political situation or the relative strengths or weaknesses of this or that player or region on the final outcome. The relatively larger transparency or visibility within such a multilateral context as to the elaboration of solutions and the decision-making process leading to them should also favour the broad international acceptance of such substantive law and principles or of those revealed through decisions made by dispute resolution mechanisms set up within the context of such multilateral agreements. This type of multilateral approach would probably be more conducive to laying the groundwork for a new international or transnational law of private investment enjoying broad international consensus, including the dispute resolution methods being a component of, or at least concomitant to, such international or transnational law.

This article will first describe (in Part One) different aspects of international dispute settlement mechanisms regarding foreign investment provided for in existing or draft international agreements—multilateral or not—and consider in a comparative way similarities and differences regarding the scope, operation and objectives of such mechanisms as reflected in the different agreements or draft agreements being considered. Such comparison will include an evaluation of the impact of the scope of the international agreements being considered (bilateral, plurilateral, multilateral) and on similarities or differences detected in the dispute settlement mechanisms available under such agreements.

In Part Two, the article will describe the principle international arbitration mechanisms at present being contemplated in international foreign investment protection agreements. A final part (Part Three) will set forth conclusions on the

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<sup>2</sup> See H. Grigera Naón, *Foreign Investment Arbitration in Latin America: The New Environment*, International Commercial Arbitration Committee, ABA, Section of International Law and Practice, Newsletter, Vol. 1, Winter 1995, 14–23.

importance of this kind of dispute resolution mechanism in facilitating the flow of foreign investment across frontiers, and the convenience of permitting the parties to investment disputes to choose among well-reputed and experience-tested international institutional arbitration devices when the moment comes to advance their rights through international arbitration.

PART ONE: *Different Aspects of International Dispute Settlement Mechanisms in International Investment Protection Agreements*

A. GENERAL DESCRIPTION

Existing international agreements regarding investment protection may be broadly characterized either as bilateral, as minilateral or as plurilateral. There is not yet a wide range of multilateral agreements enjoying wide international consensus concerning investment (see, however, as a serious attempt in this direction, the Energy Charter Treaty). The Draft Multilateral Agreement on Investment prepared by the Organisation for Economic Co-operation and Development<sup>3</sup> (MAI Draft), while yet on the drawing board, was stalled as a result of a number of political and “national interest” reasons. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is not really a multilateral treaty concerning investment protection but a legal framework providing for mechanisms for the resolution of disputes arising out of a foreign investment between the private investor and the host country as a result of substantive guarantees, rights and obligations not set out in the Convention. It will thus be considered as one of the various arbitration systems or facilities available under the different international agreements regarding investment protection.

Normally, there are certain important differences in the general aims and purposes underlying bilateral and minilateral, plurilateral or multilateral investment treaties. Whilst bilateral investment treaties generally only aim at providing specific solutions for the protection of foreign investment within the bilateral context, minilateral or plurilateral investment treaties are usually entered into within the larger framework of regional economic co-operation or integration efforts among the Member countries according to ideas of open regionalism<sup>4</sup> and should be seen, both as to their substantive law provisions and dispute settlement mechanisms, from the broader perspective of the other economic and commercial matters dealt with in such treaties, including the methods for resolving or dealing with disputes related to such other matters. However, the general approach to dealing with substantive foreign investment protection issues and the dispute resolution mechanisms provided in such treaties is generally surprisingly similar despite the existence of certain marked differences or particular traits.

In general terms, it may be safely stated that dispute settlement mechanisms in

<sup>3</sup> DAFEE/MAI/NM(97)2, 1 October 1997.

<sup>4</sup> See H. Grigera Naón, *Regionalism and the Transfer of Sovereignty*, 27 *Law & Policy in International Business* 1073, 1996.

multilateral, bilateral and minilateral investment agreements have been heavily influenced by the pattern of bilateral investment treaties developed in the 1980s and early 1990s. It is clear, for instance, that NAFTA Chapter 11 paid attention not only to the U.S. Model BIT agreement but also to some specific examples of its application, as for instance the Argentina–United States BIT entered into shortly before. The same could be said in respect of MERCOSUR’s 1994 Colonia and Buenos Aires Protocols, respectively regarding foreign investment from one MERCOSUR country into another and from a non-MERCOSUR country into a MERCOSUR country, and the Energy Charter Treaty. However, minilateral agreements have also had considerable impact on the formation of a new dispute settlement law regarding foreign investment by creating a progeny of other international agreements closely following in their steps. One example is Chapter XVII of the Treaty on Free Trade between Mexico, Colombia and Venezuela (Treaty of Three) which in many ways is a replica of NAFTA Chapter 11. It is also clear that the MAI Draft has been considerably influenced by NAFTA’s Chapter 11.

A substantial number of bilateral investment treaties permit only the private investor to choose the method of dispute resolution provided in the treaty that he will resort to. The options offered are normally the courts of the host State or international arbitration. However, the latter usually may only be resorted to after a cooling-off period has elapsed. In many BITs, and also under NAFTA’s Chapter 11 (Article 1120) it extends to six months or 180 days. Unusually, the Energy Charter Treaty limits this period to three months only (Article 26(2)). The purpose of such period is to give room for negotiations between the host State and the private investor to find an amicable solution to the problem or to allow the host State to change the legislation or administrative measures that gave rise to the claim. Certain treaties, particularly old ones, only permitted resort to arbitration after exhaustion of local remedies before the host State’s administrative authorities or courts. In certain cases (e.g. BITs signed by Argentina with, *inter alia*, Germany and the United Kingdom), the relevant treaty provides for an eighteen-month cooling-off period in which the only option for the private investor is to resort to the judiciary or the administrative authorities of the host State to obtain redress for its grievances. Should such redress not be obtained through a court decision, or should the decision obtained not resolve the dispute within such period, then it is possible to elevate the claim to international commercial arbitration under the respective treaty’s provisions.

With some isolated exceptions, such does not seem to be the recent trend. Rather, before resorting to arbitration or any other means of dispute resolution provided in the treaty, most treaties indicate that the disputing parties should first attempt to resolve their dispute amicably through “consultations” (e.g. Article IX(1) Argentina–Bolivia BIT) or “consultation or negotiation” (e.g. Article 1118 NAFTA Chapter 11). None of the treaties reviewed make any express reference to previous mediation or conciliation with the intervention of a neutral acting as mediator or conciliator, though many of



them (e.g. Article 26(2)(b) of the Energy Charter Treaty) foresee that the parties may have agreed to “a dispute settlement procedure” (which may consist of arbitration or mediation) not contemplated in the treaty.

After such a cooling-off period has elapsed, normally it is also for the private investor to choose what type of dispute resolution method the private investor may wish to have recourse to, e.g. adjudication by the courts of the host State or international arbitration. As indicated before, the number of international agreements permitting such choice also to the State party is relatively small (one additional example is Article IX of the Argentina–Bolivia BIT). Only exceptionally can such an option be made both by the investor and the State party; in other cases the treaty is not clear as to the party entitled to make such election or as to whether it may be exercised unilaterally by the claimant. In one case, at least, if the claim has been introduced by the private investor and there is no agreement with the respondent State on whether the claim should be submitted to the courts of the host State or to international commercial arbitration, the choice of the private claimant shall prevail (see Article IX(3) of the Argentina–Bolivia BIT).

The Argentina–United States BIT provides a more particular solution. After a dispute covered by the Treaty has arisen and once the cooling-off period of six months has elapsed, the private investor may opt for any of the different arbitration alternatives provided in the Treaty not when commencing the arbitration but at the prior stage of consenting to “the submission of the dispute for settlement by binding arbitration” which is a prerequisite to the actual initiation of arbitral proceedings. Once the private investor has expressed such consent, either party to the dispute (the State or the private investor) “may initiate arbitration in accordance with the choice so specified in the consent” (Article VII(3), Argentina–United States BIT).

To opt for international arbitration or for court adjudication would normally mean that such choice is final, and that the excluded alternative shall not apply. However, in certain cases the answer is more nuanced. NAFTA Chapter 11 (Article 1121(b)) especially provides that resorting to arbitration does not prevent the private claimant from commencing proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court under the law of the disputing State party. This could be interpreted as allowing the same private claimant to seek restitution (extraordinary relief) before the courts and authorities of the host country and simultaneously pursue damage compensation before an arbitral panel set up pursuant to Chapter 11.<sup>5</sup> Additionally, under this Chapter 11 provision, and unlike most BITs, having initiated proceedings before the courts of the host State does not prevent the private claimant from resorting thereafter to international arbitration as provided in Chapter 11 at any moment after withdrawing its court claims.

Save in exceptional cases like the ones mentioned above, should the private investor opt for arbitration, it is also up to the private investor to choose what arbitration

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<sup>5</sup> See G. Horlick and A. Marti, *NAFTA Chapter 11B—A Private Right of Action to enforce Market Access through Investments*, 14 J. Int. Arb. 1, March 1997, p. 43, especially at 48–49.

mechanism contemplated in the treaty should apply. The arbitral options available are normally the ICSID arbitration system, including the ICSID Additional Facility when one of the States party to the investment treaty has not ratified the ICSID Convention, and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Such is the case, for instance, of the Colonia Protocol (Article 9), of NAFTA Chapter 11 (Article 1120) and of Chapter XVII of the Treaty of Three (Article 17–8(2)). Other treaties also include the International Chamber of Commerce arbitration system as one of the possible options (such is the case, for example, of some U.K. BITs, of BITs or economic co-operation agreements to which Cuba is a party, and a number of national investment codes or laws). The United States–Republic of Haiti BIT permits the private investor to opt for ICC dispute settlement mechanisms to handle the dispute, i.e. ICC conciliation or arbitration. Article 11(2) of the Spain–Algeria BIT mentions ICC arbitration among the options available to the foreign investor for the resolution of investment disputes that may arise under this Treaty. In some cases, once the dispute has arisen, the BIT permits both the claimant and the respondent to agree on a dispute resolution method or type of arbitration not expressly contemplated in the treaty itself (see, for example, the Argentina–United States BIT, Article VII(3)(IV)).<sup>6</sup> In addition to the ICSID Convention, ICSID Additional Facility and UNCITRAL Rules alternatives, the Energy Charter Treaty (Article 26(4)(c)) also permits the private investor to opt for arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

## B. CERTAIN SIMILARITIES AND DIFFERENCES BETWEEN DISPUTE RESOLUTION MECHANISMS PROVIDED IN INTERNATIONAL AGREEMENTS REGARDING FOREIGN INVESTMENT PROTECTION

### 1. WHO IS “INVESTOR”, WHO IS “STATE”?

Among the essential elements to be considered and that may differ from treaty to treaty are the definitions of “investor” and “investment”. Such definitions play an essential role for determining the scope of dispute resolution mechanisms regarding foreign investment in such treaties. Obviously, investors and investments not included in such definitions will be excluded from the respective dispute resolution mechanisms.

Substantive definitions permitting characterization of who may be considered as investor and therefore as potential claimant and who may be considered as host State and therefore as potential respondent for procedural purposes, also has an obvious influence on the determination of the sphere of application of dispute resolution mechanisms available under the relevant treaty as well as the type of dispute resolution option that may be resorted to. A number of treaties only confer standing to the central government of the host State even when the actual recipient of the investment or the

<sup>6</sup> See the corresponding texts attached to the article of O.C. Unegbu, *BITs and ICC Arbitration*, 16 J. Int. Arb. 2, June 1999, at 93–108.

governmental unit, division or entity having originated the violation or breach from which the dispute arises is institutionally, administratively, budgetarily and politically independent from the central government. Thus, a violation incurred by a province or state in a country organized as a federal State may well be only raised against the central government of such State.

For that reason, Article 26(8) of the Energy Charter Treaty provides that an award against a State regarding a dispute arising out of measures of a sub-national government or authority of such State being a party to the dispute may only provide for damages against such State and not specific performance. The provision is a wise one since it may be impossible under the constitutional or public law of such State to compel such government or authority to remove or modify the measure leading to the dispute or occasioning the breach. As will be seen below, in all cases in which an award handed down within the context of NAFTA Chapter 11 grants restitution of property or specific performance, the defendant State may pay damage compensation instead. The MAI Draft also provides that an arbitral tribunal acting within the context of the treaty may grant:

“... restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable ...” (Section 16, p. 67).

In a number of treaties (e.g. NAFTA Chapter 11), private investors that may introduce investment claims are only those having certain real attachments to a Member country (a mere place of incorporation in a NAFTA country would not suffice, Article 1113(2)) and also not controlled by interests from third countries or countries not holding diplomatic relations with or being the subject of economic sanctions from the host State, which would be circumvented if the private investor had access to benefits under NAFTA (Article 1113(1)). Article 17 of the Energy Charter Treaty provides similarly. It is interesting to note that though the Treaty of Three follows NAFTA Chapter 11 closely, it does not contain an equivalent provision. The provision in NAFTA Chapter 11 follows a similar provision in the Argentina–United States BIT (Article I(2)). NAFTA Chapter 11 also permits a national of a host State to introduce a claim against such State if he is a permanent resident in another Member State (Articles 201(1) and 1139).<sup>7</sup> Such is also the case of the Energy Charter Treaty (Article 1(7)(a)) and the MERCOSUR 1994 Colonia Protocol referring to intra-MERCOSUR foreign investment (Article 1(2)(a)) though this latter provision excludes nationals from another Member State who are permanent residents of the Member State against which the claim is filed, unless it is proved that resources invested come from abroad. A similar provision (establishing that the period of residence in the host State must be at least two years) may be found in Article I(3) of the Argentina–Bolivia BIT and Article I(5) of the Argentina–Chile BIT. Under NAFTA Chapter 11 (Article 1139) and Chapter XVII of the Treaty of Three (Article 17–01), a

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<sup>7</sup> See Horlick and Marti, *supra*, footnote 5.

Member State may be also a foreign investor. This is not necessarily the case in other treaties regarding investment protection.

These peculiarities may also affect the dispute resolution options available under the respective treaty: specifically, arbitration under the ICSID Convention or under ICSID's Additional Facility Rules may not take place if the private claimant is a national of the host State even if he is a national of another Member State or is a juridical person having the nationality of such State though being permanently based in another Member State. Exceptionally, the ICSID Convention parties involved in the dispute may agree that because of foreign control such juridical person should be treated as a national of a Member State other than the host State, but if such is not the case, such company may not commence ICSID Convention or ICSID Additional Facility arbitration against such host State.<sup>8</sup> ICSID Convention and ICSID Additional Facility arbitrations are not available either when both parties are States. It should be borne in mind in this respect that a certain number of BITs, of multilateral treaties (e.g. the MERCOSUR 1994 Colonia Protocol Article 6, and Buenos Aires Protocol (Article 2(F)) and even the Energy Charter Treaty (Article 15) and the MAI Draft (Section 5, p. 54) authorize the assignment by the private investor of all its rights against the host State to a Member country or its designated agency which, under an indemnity or guarantee given in respect of such investor or its investment by such Member country or agency, paid compensation to indemnify such investor for damages arising from a taking or other measure negatively affecting the private investor's rights. Such country or State agency will be in the position of exercising all the rights of the covered investor against the host State, including the rights to enforce such claims under the relevant treaty or agreement. This could be a case of State-to-State claim that would not fall within the scope of either the ICSID Convention or ICSID Additional Facility arbitration. In such hypotheticals, the investment claim will have to be taken to other options available under the relevant investment treaty, such as ICC or UNCITRAL arbitrations.

Furthermore, it is legitimate to consider—if the topic is the treatment of foreign investment and the relationship between the host State and the private investor within the more general context of setting up or restating a body of international substantive law and concomitant dispute settlement rules dealing more exhaustively with issues arising out of such relationship—whether such treaties should not also be concerned with the substantive obligations of a private investor *vis-à-vis* the host country, and the remedies the latter may resort to should such obligations be breached or not duly honoured. If such questions are considered, and substantive provisions in this respect are incorporated or rendered applicable, it seems difficult not to consider as well the methods of dispute resolution—domestic and international—the host State would be entitled to access in order to seek redress for any wrongs it would have suffered from

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<sup>8</sup> See Parra, *supra*, footnote 1, page 324. Additionally, the ICSID Convention requires that both the State disputing party and the State of the private investor be ICSID Convention parties, and the Additional Facility Rules that one of such countries be an ICSID Convention Party (Article 25(2), ICSID Convention; Article 2, Additional Facility Rules; Parra, *ibid.*, pp. 287, 299, 329 and 346).

such infringements, and the mechanisms available to ensure that determinations in that respect (judicial or arbitral) are effective and enforceable internationally or extraterritorially. Such development would, of course, raise a myriad of issues as interesting as difficult, such as the standing of the host State to act as plaintiff before international instances, including international commercial arbitral tribunals, and the obligation of the private investor to submit to international arbitration (if such is the venue chosen by the claimant State) absent an arbitration agreement freely negotiated and accepted by it, the identification of matters (maybe not all defined in or arising out of the treaty) that may give rise to an international arbitral claim from the host State, the level of co-operation and support of the authorities and courts of the State of origin of the private investor in the conduct of arbitral proceedings introduced by the host State and in the enforcement of arbitral orders, interim relief, summons, subpoenas, determinations and awards issued in the course of or resulting from such proceedings.

In any case, even within the more reduced or less ambitious context of investment protection provided by existing international agreements, some treaties permit the host State to file an arbitral claim against the private investor (see, for instance, Article VII(3) of the Argentina–United States BIT mentioned above). It is not clear, however, in view of the fact that such agreements normally provide only for guarantees addressed to private investors, what type of claim such could be.

One possibility could be seeking a declaratory award deciding that the host State is not in breach of its obligations under the treaty. Another could be a counterclaim filed by the host country against the foreign investor arising out of the same factual and legal situation that already gave rise to a claim of such investor against the host State. However, even in such a scenario, an additional complication may arise if the treaty does not expressly provide that upon or prior to filing an arbitral claim against the host State pursuant to the treaty, the private investor submits itself to the jurisdiction of the intervening arbitral tribunal. This is established, for example, in NAFTA Chapter 11, but only for the case of a claim introduced by the investor. NAFTA Article 1121 provides that private investors submitting arbitral claims against a host State may only do so if they also consent to arbitration under the treaty and waive their right to initiate or continue any proceedings with respect to the protective measure such State is alleged to have breached before any administrative tribunal or court under the law of such State or other dispute settlement procedure. Absent a provision like that or an express submission by the private investor, the latter could successfully object to be brought in as counterdefendant in the arbitration it commenced.<sup>9</sup> Another practical effect of this submission by the private investor is to ensure that treaty provisions on consolidation proceedings—which may lead to a private investor claimant being forced, at the initiative of the defendant host State, into consolidated arbitration proceedings under

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<sup>9</sup> Nevertheless, absent a contrary mandatory rule or principle arising out of the relevant treaty itself, the argument can be made that the State parties may introduce a counterclaim against the private investor claimant if the applicable arbitration rules permit respondents to file counterclaims; see, for example, Article 5(5) and (6) of the ICC Arbitration Rules. See, also, I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Review–Foreign Investment Law Journal 299, 1999, at 320.

arbitration rules and with parties not originally envisaged by such investor when taking the dispute to arbitration (Article 1126)—shall be applicable to such investor. A similar consent from the private investor introducing an arbitral claim is required under Article 26(4) of the Energy Charter Treaty though this international instrument does not have any provision on consolidation of arbitral proceedings involving a Member country and a private investor.<sup>10</sup> The MAI Draft, which provides for consolidation provisions (Section 9, p. 65), also establishes that the private investor submits to arbitration under the treaty by filing its arbitral claim or through its advance written consent (Sections 4–5, p. 63). However, these international agreements do not seem to contemplate the possibility of claims being introduced by the host State against covered private investors under the applicable international dispute resolution mechanisms.

As indicated before, there are, however, treaties which provide for the right of any party, including the host State, to introduce arbitral claims.<sup>11</sup> Such international agreements provide for the compulsory submission of the host State to international arbitration but remain silent as to any obligation of the private investor to submit to arbitration. Though authorizing the host State to file claims against such foreign investors, they do not impose any obligation on the defendant investor to submit to arbitration. Thus, there does not seem to exist sufficient assurance that, absent the specific consent of the defendant investor, claims of host States shall be heard by international arbitral tribunals set up within the context of such treaties or even that the claimant State will be able to request and obtain the constitution of an arbitral tribunal within such setting. Nevertheless, Article VII(3)(a)(ii) of the United States–Republic of Haiti BIT of 13 December 1983 permits that once the investor party to the dispute has consented to submit it to the International Chamber of Commerce—an option to be exercised within six months after the dispute originated and so long as the dispute has not been submitted to another previously agreed dispute resolution device or the investor party did not resort to the courts of the State party (Article VIII(3) of this Treaty)—any party may institute proceedings before the ICC, and in case of disagreement on the dispute settlement mechanisms (ICC arbitration or ICC conciliation), the investor's preference as to arbitration or conciliation shall prevail.<sup>12</sup>

## 2. WHAT IS “INVESTMENT”?

As mentioned before, in this legal field, like in most others, issues of substantive applicable law or principles are intimately associated with the effectiveness and scope of the dispute settlement mechanism envisaged, for instance, by a discrete international agreement or piece of national legislation (e.g. a foreign investment national code). As an illustration, the scope of the definition of investment will necessarily circumscribe

<sup>10</sup> See J. Paulsson, *Arbitration without Privity*, 10 ICSID Review-Foreign Investment Law Journal 232, 1995.

<sup>11</sup> See BITS between France on one side and Poland, Vietnam, Mongolia and Czechoslovakia on the other; G. Burdeau, *Nouvelles Perspectives pour l'Arbitrage dans le Contentieux Économique Intéressant les États*, *Revue de l'Arbitrage*, 1995, at 3, 20.

<sup>12</sup> See *supra*, footnote 6, and corresponding text.

matters that are arbitrable under the dispute settlement mechanism which will become operational and lead to the crafting of the applicable remedy in case of dispute. For instance, the Argentina–United States BIT (Articles I and VII) permits in broad terms to submit to international arbitration all sorts of contractual claims from the private investor, including those arising out of loan agreements and all sorts of tangible and intangible assets and rights. Equally broad is the definition of investment in Article 1(6) of the Energy Charter Treaty. In the recent decision on jurisdictional matters rendered by an ICSID arbitral panel interpreting the BIT of 22 October 1991 between the Republic of Venezuela and the Kingdom of The Netherlands, “investment” was held as covering all sorts of titles to money, including loans and portfolio investment.<sup>13</sup>

The answer under NAFTA’s Chapter 11 is much more qualified. For instance, claims under loan agreements with a maturity of less than three years, or claims under loan agreements to a State enterprise are not considered as foreign investment claims (see NAFTA Article 1139). Claims under loan agreements to the State or a State enterprise and claims regarding commercial contracts for the sale of goods or services and the extension of credit in connection with a commercial transaction, such as trade financing, are totally excluded from the Treaty of Three, Article 17-01, and thus may not be submitted to dispute resolution mechanisms (including international commercial arbitration) available to private investors under Chapter XVII of this Treaty. Though provisions on investment protection and dispute resolution methods for investment disputes in the Treaty of Three follow very closely and in most cases are identical with similar provisions in NAFTA Chapter 11, there are also significant differences. One of them is that Colombia has indicated that though it shall not adopt measures with respect to nationalization, expropriation and compensation that are more restrictive than those in effect at the time the Treaty of Three enters into force, it reserves in full its right to apply Article 17-08 of this Treaty. The other contracting parties, Mexico and Venezuela, have expressed that they shall apply the said Article only as of the time Colombia shall have informed them that it has withdrawn its reservation (Annex to Article 17-08). Specifically, Article 17-08 is a pivotal disposition of the Treaty of Three, since it provides for the guarantee against expropriation and the criteria for fixing and paying compensation therefor. This suggests that so long as this reservation shall not have ceased to be effective, no disputes arising out of expropriation and corresponding compensation may be taken to international commercial arbitration or any other dispute resolution method contemplated under Chapter XVII of the Treaty of Three for settling disputes between a private investor and a host Member State save the judiciary of the host country.

The fact that the definition of investment may be extended in many BITs to intellectual property, particularly when such treaties do not exclude certain remedies from those that might be available to the private investor before international arbitral tribunals—e.g. specific performance—may at least in theory render certain issues

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<sup>13</sup> *FEDAX N-V and the Republic of Venezuela*, 37 ILM 1378, 1998.

arbitrable, for example, the validity of intellectual rights and patent rights in respect of the authority granting it and *erga omnes*—which might otherwise not be arbitrable before an international, perhaps even a domestic tribunal if the definition of investment did not extend to such type of rights. However, each treaty must be looked at on a case-by-case basis, since each one responds to the discrete range of interests, national traditions and bargaining power context underlying the participating countries and their negotiations and may provide for different remedies in case of violations negatively affecting private investors' rights.

Similar considerations apply to other delicate issues, such as whether the guarantee or protection afforded by the investment treaty extends to the right of establishment of a prospective investor or to what has been more broadly characterized as “market access”. A number of bilateral and multilateral treaties do provide protection for this type of rights to prospective investors from Member countries seeking investment opportunities in another Member country. The immediate question that arises is whether a prospective private investor from a Member country may have direct access to an international jurisdiction (e.g. international commercial arbitration) to seek redress against the host Member State having curtailed or denied such investor's rights of establishment or market access.

Whereas within the context of certain treaties such type of access is warranted—e.g. the dispute settlement mechanism in Section B of NAFTA Chapter 11 covers any claims under Section A thereof, including direct or indirect claims of investors on their behalf or investors' claims on behalf of an enterprise of the other NAFTA party directly or indirectly controlled by such investor (Articles 1116–1117) and claims related to the fact that such investor or enterprise is seeking to make an investment in such NAFTA party (see Article 1139) though Mexico and Canada have excluded market access to certain areas from the dispute resolution mechanisms under Chapter 11 (see Annex 1138.2)—such possibility may not be taken for granted within the context of other treaties guaranteeing market access. See, for example, the Argentina–United States BIT, whose Article II includes a guarantee to market access but whose Article VII excludes from the notion of investment, for dispute resolution purposes, disputes not arising out of or related to:

- (i) an investment agreement between the host country and the private investor;
- (ii) an investment authorization granted by such party's investment authority; or
- (iii) an alleged breach of any right conferred under the treaty with respect to an investment, this latter hypothesis apparently referring to a situation where an investment has been already made in the host Member country.

The definition of investment and investor of a party under the Treaty of Three (Article 17–01) does not authorize interpreting this Treaty as enabling a private investor to file a market-access claim under any of the dispute resolution mechanisms for resolving claims of private investors against a host Member State under Chapter XVII



thereof. Article III(2) of the Argentina–Bolivia BIT very clearly states that investments covered by the Treaty are only those that have been already admitted by the host Member country. The same may be said of the Argentina–Chile BIT (Article II(2)). Finally, certain types of claims may not be handled under all the dispute settlement options made available to the private investor or the disputing parties under the different BITs or international agreements on foreign investment protection. For instance, disputes on market access or admission or establishment of investments may not be handled through ICSID Convention arbitrations.<sup>14</sup> Thus, the substantive definition of investment also influences the type of dispute resolution mechanisms available under the international agreement at stake.

The carving out of certain substantive law matters (environment, contractual breaches not sufficiently related to investment issues, tax) also has an impact on the dispute settlement mechanism and its sphere of application, as may be seen in NAFTA Chapter 11. The presence and operation of a most-favoured-nation clause may be construed and interpreted—depending on how it has been worded—as giving access to a private investor in one investment protection treaty to methods of dispute resolution more favourable to it envisaged in another investment protection treaty having the same host State against which the claim is addressed as party but not the country of origin of the private investor. In other treaties, claims that may be submitted to international arbitration need not arise out of the breach of specific treaty provisions but may grow out of the breach of investment agreements entered into with the private investor, of investment authorizations granted to him or find their support in general legislation related to or affecting foreign investment. Thus, no thorough assessment of the real impact of dispute resolution provisions may be made if not considered against the backdrop of the substantive provisions under the treaty in question or applicable because of it. This may also concern provisions in the investment contract between the host State and the private investor regarding resolution of disputes and their interaction with dispute resolution provisions in the applicable investment treaty. For example, in a recent preliminary decision on jurisdiction rendered by an ICSID arbitral tribunal, it was found that the choice-of-forum clause referring to the jurisdiction of the federal courts of the State party to a concession agreement entered into with the foreign investor could not prevail over the international arbitration options under the BIT between such State and the country of such investor applicable to investment disputes when the investor's claims fell within the scope of the BIT.<sup>15</sup>

Finally, the nature of the claim may have an impact on the type of dispute settlement option available under the relevant treaty, notwithstanding how broad the definition of investments covered under such treaty might be. For example, the Secretary-General of ICSID may choose not to accept the registration of an arbitration request if it arises under a transaction that cannot be characterized as an investment

<sup>14</sup> See Parra, *supra*, footnote 1, at 287 and 325.

<sup>15</sup> *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ABB/97/6 (unpublished). See chronicle at Powell, Goldstein, Frazer & Murphy, International Bulletin, 3 November 1999.

under the ICSID Convention (e.g. a sale of goods) though constituting a covered investment under the applicable treaty. Also, ICSID's Secretary-General would refuse to approve agreements for the settlement of disputes under ICSID's Additional Facility Rules if the transaction giving rise to the dispute is of "ordinary commercial" nature.<sup>16</sup>

### 3. THE IMPACT OF THE DISPUTE RESOLUTION MECHANISM ON THE APPLICABLE LAW

From a different angle and as mentioned above in the Introduction, the type of dispute settlement mechanisms chosen by a claimant (as he is entitled in the large majority of BITS and other international instruments) and the conflict-of-laws rules to be observed by the selected (national or international) jurisdiction may affect the applicable substantive law. In principle, opting for international commercial arbitration as a dispute settlement method may have an impact on the way the dispute may or will be resolved as to the merits. Because of its relatively delocalized nature and the fact that under modern national legislations and treaties regarding international commercial arbitration the means of reviewing arbitral awards on the merits are or may be reduced, not available or deemed as waived, both the grounds for annulling or setting aside arbitral awards and those for denying the recognition or enforcement of foreign arbitral awards or curtailing the extraterritorial effects of arbitral awards are limited. It is generally admitted that international commercial arbitrators enjoy considerable discretion when determining the law or rules of law applicable to the substance of the dispute unless the parties have themselves settled such matters through a choice-of-law stipulation.

In any case, international commercial arbitral tribunals have shown a clear tendency towards assigning primary importance in the resolution of disputes to the text of the contracts or legal instruments from which the dispute arises and to the analysis of factual issues surrounding the dispute, as well as to the consideration of trade usages. Often, international commercial arbitrators have decided that such elements, or a combination of them, suffice for deciding the dispute without the need of identifying the national, a-national, or international legal rules or principles which would apply. Furthermore, international commercial arbitrators may feel more inclined not to advance the application of domestic national law when clearly parochial and not destined for or found appropriate to govern international commercial transactions. In other opportunities, particularly within the context of State contracts or disputes to which a State is a party, international arbitrators may be led to construing and interpreting national applicable laws and even judge on whether they may be validly applied or not in the light of general principles of law or of international law.

Most BITS and other international agreements regarding foreign investment protection expressly provide, however, for conflict-of-laws rules which should be observed both by the national (host State) jurisdiction or the arbitral tribunal called to

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<sup>16</sup> See Shihata and Parra, *supra*, footnote 9, at 306–9; 344–5.

decide the dispute. A substantial number of them indicate that the investment treaty provisions, the laws of the host country (occasionally, including its conflict-of-laws rules), the provisions of the applicable investment contract or authorization and principles of international law shall apply, which means that national legal sources are not likely to have absolute control on the resolution of the dispute on the merits.

Other agreements—as is the case, for instance, of NAFTA Chapter 11 (Article 1131), of Chapter XVII of the Treaty of Thrice, or the Energy Charter Treaty (Article 17–20(1))—merely refer to the application of such treaty provisions and principles of international law excluding any reference to any national law or the laws of the host State. In such cases, it is clear that the application of international legal sources will be privileged when it comes to deciding on the merits of the dispute. Interestingly, the MAI Draft differentiates between disputes arising out of breach-of-treaty provisions themselves—which are governed by the treaty as interpreted and applied in accordance with the applicable rules of international law—and disputes occasioned by a breach of the applicable investment agreement or authorization, which shall be decided according to such rules of law as may be agreed by the parties to the dispute. If they remain silent in this respect, the dispute will be decided in accordance with the law of the Member country party to the dispute (including its rules on conflict of laws), the law governing the authorization or agreement and such rules of international law as may be applicable (MAI Draft, Section 14, p. 67).

#### C. “BILATERALISM”, “MINILATERALISM”, “PLURILATERALISM”, “MULTILATERALISM” AND FOREIGN INVESTMENT DISPUTE SETTLEMENT

It would seem that minilateral, plurilateral or multilateral investment treaties—though generally responding to the same pattern concerning dispute settlement mechanisms foreseen in BITs—contain provisions regulating in a more thorough or technically appropriate way than bilateral investment treaties, a number of important matters having direct or indirect impact on the dispute resolution mechanism contemplated in the treaty being considered. One of the reasons for such circumstances may be the fact that negotiations among more than two parties take longer and lend themselves better to analysing more carefully some of the implications deriving from legislating or failing to legislate on certain matters from different technical angles, legal and non-legal. Another factor is that, in such negotiations, the bargaining power of the participants may be more evenly balanced or may provide for a better context for alliances among the weaker parties *vis-à-vis* the stronger ones. The fact that those participating in a plurilateral negotiation are all developing countries (e.g. the Group of Three Treaty among Mexico, Colombia and Venezuela) may also have an impact. However, no general rule may be detected or confirmed in this respect. For example, as mentioned before, NAFTA Chapter 11 contains provisions on the type of investments covered and the persons or entities qualifying as foreign investor considerably more

nuanced or stringent than those of certain BITs. Nevertheless, there are BITs that are less generous than NAFTA Chapter 11, as is the case of such treaties to which China is a party, which reduce the scope of arbitrable matters to the determination of the compensation payable in case of expropriation, and apparently exclude from arbitration issues related to the validity or compatibility of the taking itself from the perspective of international legal standards. If prospective investors to which NAFTA market access has been denied are entitled to resort to arbitration, as also indicated before, that is certainly not the case in a myriad of BITs. So, involvement in bilateral negotiations does not necessarily imply that relatively weaker or developing host States shall grant larger concessions than if such negotiations had been carried out on a more plurilateral or even on a multilateral basis.

Nevertheless, a unilateral foreign investment protection international agreement such as NAFTA Chapter 11 excludes from international arbitration a number of important issues which are then, in principle, left within the sphere of the jurisdiction of the courts and authorities of the host countries.

In the first place, NAFTA Chapter 11 provides that certain measures taken by the State remain outside or, in principle, are not covered by the Treaty and in consequence may not fall under the dispute settlement mechanisms set forth in Chapter 11. Thus, non-discriminatory measures of general application may not be considered an expropriation of a debt security or loan covered by Chapter 11 solely on the ground that it imposes costs on the debtor that cause it to default on the debt (Article 1110(8)). Chapter 11 may not be construed as preventing a party from adopting, maintaining or enforcing environmental measures in agreement with Chapter 11 though it also provides that Member countries may not encourage investment by relaxing domestic health, safety or environmental measures (Article 1114). Protected investment does not include money claims arising solely from commercial contracts for the sale of goods or services or the extension of credit in connection with a commercial transaction except for loans otherwise considered as a covered investment (see definition of “investment” in Article 1139). This should be contrasted with the broader characterization in many BITs of any type of contractual right as “investment”.

There are also certain features affecting arbitral proceedings that are found within the context of unilateral, plurilateral or multilateral treaties, that are normally absent from BITs and that may be considered as primarily aimed at accommodating the concerns of the host State that may become a disputing party to an international arbitration under the relevant treaty.

For example, NAFTA Chapter 11 (Article 1116) provides for a limitation period of three years after the investor first acquired or should have first acquired knowledge of the alleged breach, for filing claims—arbitral or not—within the context of Chapter 11 and that it has incurred loss or damage (the MAI Draft proposes a five-year time-bar, Section 4, p. 63). Thus, this provision not only introduces a time-bar on private investors’ claims but also establishes that there may not be a cause of action unless the claimant investor has incurred loss or damage. The same approach is followed in the

MAI Draft (Section 1(a), p. 62). Accordingly, the notice to be delivered by the disputing investor to the defendant State communicating its intent to submit a claim to arbitration must identify the relief sought and the approximate amount of damages claimed (Article 1119 Chapter 11; also in this sense, Section 4, MAI Draft, p. 63). Also, Article 1126 of NAFTA Chapter 11 permits any disputing party, including a host State party to NAFTA, to request consolidation of different arbitration proceedings. The MAI Draft also provides for such consolidation (Section 9, p. 65).

In such hypotheses, under NAFTA Chapter 11 an arbitral tribunal is set up under the UNCITRAL Arbitration Rules to determine whether different claims submitted to arbitration against the same State by different private investors present questions of law or fact in common and should therefore, in the interest of the fair resolution of the claims, be heard and decided together, in full or in part, in one and the same arbitral proceeding. This may render it easier for the host State to group in only one proceeding the decision of the same issues raised by different parties, thus saving time, costs and the risk of contradictory decisions regarding the same matters.

The MAI Draft shares this philosophy. However, under the MAI Draft it is only for the State party to the dispute to request consolidation. Furthermore, consolidation should take place as agreed by the parties, and absent such agreement, the consolidated proceedings shall be handled under the available arbitration system under an MAI (ICSID Convention, ICSID Additional Facility, ICC Arbitration Rules or UNCITRAL Arbitration Rules) to which the greatest number of arbitration parties had submitted claims or, if there is an even distribution, under the UNCITRAL Arbitration Rules. The arbitral panel will have three members, and the arbitrators will be appointed under the general rules of the MAI Draft, i.e. if the consolidated proceedings are administered under the ICSID Convention, the ICSID Additional Facility or the UNCITRAL Rules, the appointing authority will be ICSID's Secretary-General; if they are conducted according to the ICC Arbitration Rules, the appointing authority will be the ICC International Court of Arbitration (MAI Draft, Section 9, p. 65; Section 7(b), p. 64).

Within thirty days of submitting an arbitral claim under NAFTA Chapter 11, a disputing party shall deliver to all parties to NAFTA written notice of the claim and copies of all pleadings filed in the arbitration (Article 1127). Any State party may adopt the role of *amicus curiae* in the course of an arbitration in which it is not a disputing party in order to introduce submissions concerning the interpretation of NAFTA (Article 1128). In this way, such State may influence the decision-making process when it feels that a certain interpretation may affect its interests though the award would not be binding on it and though a Chapter 11 award is made only in respect of the particular case (Article 1136). Under the MAI Draft, it is for the arbitral tribunal, once constituted, to notify the Parties Group of its formation. The tribunal may give to any Member country requesting it an opportunity to submit written views on legal issues in dispute, provided that the proceedings are not unduly delayed thereby. Any Member country having requested the opportunity to present its views on issues in

dispute in which it has a legal interest within thirty days after receipt by the Parties Group of the notification of the tribunal's formation shall be granted such opportunity (MAI Draft, Section 12, p. 66).

Both NAFTA Chapter 11 (Article 1133) and the MAI Draft (Section 5, p. 58) permit arbitral tribunals operating under their rules to request, on their own initiative or if so solicited by a disputing party, written reports from experts on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party. This will permit an arbitral panel to duly take into account informed opinions on vital matters that may affect the national communities directly or indirectly affected by the dispute when preparing its award.

Furthermore, when a disputing party asserts as a defence that the measure alleged to be in breach may not be arbitrated because it falls under the authorized reservations or exceptions set out in Annexes I–IV, it may request an interpretation on the issue from the NAFTA Free Trade Commission comprising cabinet-level representatives of the Member countries (NAFTA Chapter 20, Article 2001(1)), which is to be rendered within a sixty-day period and shall be binding on the arbitral tribunal (Article 1132). Thus, a State party may take the decision of such matters to an inter-governmental context—since the Commission is composed of representatives from the Member countries—and exclude it from the arbitral instance chosen and triggered by the private claimant.

Even if a NAFTA Chapter 11 arbitral tribunal may award restitution of property or specific performance, the disputing host State may pay monetary damages plus interest instead of restitution (Article 1135(1)(b)). As already pointed out, the MAI Draft has a similar provision. Thus, the State being a disputing party is not bound to carry out measures that may imply abdicating sovereign rights by compelling it to change its legislation or State acts or ignore its court decisions in order not to incur international responsibility for infringing its treaty obligations that may ensue should it not comply with the award. Also, though a NAFTA Chapter 11 arbitral tribunal may issue interim measures of protection, it may not order an attachment or enjoin the application of the measure of the host State constituting the breach on which the private investor's claim is based under Articles 1116 or 1117. Chapter 11 arbitral tribunals may not order a State party to pay punitive damages either (Article 1135(3)).

Chapter 11 also provides for grace periods during which an award may not be enforced after having been rendered. This is either one hundred and twenty days from the date of the award rendered within the ICSID Convention framework when its revision or annulment has not been requested or so long as such revision or annulment proceedings, if initiated by any disputing party, have not been completed; in all other cases—awards made under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules—three months must have elapsed from the date of the award when no disputing party has commenced proceedings to revise, set aside or annul the award or, if initiated, so long as they shall have not been completed (Article 1136). This provision gives breathing time to the State party to prepare for enforcement or to launch

negotiations which may lead to an amicable settlement. Nevertheless, failure of a State party to comply with an award within the prescribed time-limits will authorize the Member country of origin of the private investor to request the Commission to determine whether failure to abide by the final award is inconsistent with NAFTA obligations and to recommend that such non-abiding State party comply with the award (Article 1136(5)). Failure to do so will give rise to such State's responsibility under public international law resulting from a violation of its treaty obligations.

All of the above NAFTA Chapter 11 provisions and similar provisions in Chapter XVII of the Treaty of Three—negotiated within a minilateral context—may then be regarded as aimed at taking care of certain important concerns of the State party and are not normally found in BITs. Nevertheless, treaties negotiated, concluded and applying within a truly multilateral context, such as the Energy Charter Treaty, do not always contain similar provisions benefiting or likely to primarily benefit the disputing host State. It is also interesting to note that Chapter 11 dispute resolution provisions crafted within the context of negotiations between a developing country (Mexico) and two developed countries (Canada and the United States) were largely found as substantially appropriate to regulate essentially the same subject-matter within the context of Chapter XVII of the Treaty of Three involving only developing countries. One wonders if it is not at the level of this type of minilateral and potentially plurilateral or multilateral context—for instance, if the NAFTA membership expands—that one should really be looking for the incipient law on the resolution of investment disputes between a private investor and a host country. The fact that the MAI Draft, whose negotiation was undertaken within a multilateral context and is intended to have multilateral scope, largely followed—as has been seen—the general orientation and many of the solutions specified in NAFTA Chapter 11 and Chapter XVII of the Treaty of Three, may be seen as a confirmation of this trend.

## PART TWO: *Different Arbitration Options available under International Agreements on Investment Protection*

### A. INTRODUCTORY REMARKS

A survey of the different arbitration options available under the various international bilateral or plurilateral agreements on foreign investment shows primarily that they may be classified either as *ad hoc* or institutional arbitration options. This analysis will be limited to the international arbitration options more currently found in international agreements or foreign investment protection legislation. Of course, arbitration options available under public international law to sovereign States only regarding the interpretation or breach of investment treaties are excluded.

There is another qualitative difference between the arbitration devices that will be examined. As it will be shown below, the ICSID Convention arbitration system is incorporated into an international convention which isolates it within the sphere of

application of such convention from the supervisory and review jurisdiction of national State courts, including those of the country where the arbitration takes place, and enables the recognition and enforcement of ICSID Convention arbitration awards without going through *exequatur* proceedings before the national courts of the ICSID Convention Member countries where such recognition or enforcement is sought. Other forms of international commercial arbitration contemplated in BITs and other international agreements, including ICSID Additional Facility Rules, UNCITRAL Arbitration Rules and ICC Arbitration Facility Rules, UNCITRAL Arbitration Rules and ICC Arbitration Rules, do not enjoy the same status. In principle, arbitration procedures and awards rendered as a result of arbitrations conducted under such rules are subject to the controls of State courts of the place of arbitration and subject to *exequatur* proceedings in the country where enforcement is sought, normally when such country is not the country where the award has been rendered. However, the following considerations should be borne in mind:

*Point 1:* In a very important and increasing number of countries, controls on arbitral awards rendered in such countries primarily as a result of international commercial arbitration proceedings have been reduced to the minimum needed to ensure that basic public policy principles and due process principles are not violated. In some countries, the parties may enter into exclusion agreements excepting in varying degrees awards rendered in international commercial arbitrations from the controls of the courts of such country (e.g. Switzerland, Belgium, England, Wales, Northern Ireland and Peru). In parallel, interference of local courts in the conduct of arbitration proceedings primarily related to international commercial matters has been also reduced whereas the availability of State courts to lend their support to international commercial arbitration (e.g. for enforcing arbitral orders, including interim measures of protection) has been expanded. One of the reasons for these developments is the world-wide adoption by different national jurisdictions in both developed and developing countries of UNCITRAL's Model Law on Commercial Arbitration or the main principles underlying this Model Law, which should be considered as largely representing a global consensus as to the level of controls that should be exercised on arbitral proceedings as well as on the type and scope of support to be afforded by national judiciaries in respect of international commercial arbitrations.

*Point 2:* There is a world-wide or regional ratification of major international conventions facilitating or enhancing the extraterritorial recognition and enforcement of arbitral awards and the international effectiveness of arbitration agreements. The most important example is the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. One regional example is the 1975 Panama Inter-American



Convention on International Commercial Arbitration. Such conventions introduce uniform criteria for ensuring the extraterritorial effectiveness of arbitration agreements and facilitating and furthering the recognition and enforcement of foreign awards by reducing controls exercised by the courts of the country of recognition or enforcement on such awards to the minimum needed to safeguard basic general principles of public policy and due process concerns of such country. Such conventions, for example, do away with the possibility that the courts of the country of enforcement review the foreign award on the merits or resort to local or parochial criteria to refuse recognition or enforcement of foreign awards.

*Point 3:* Provisions on the recognition or enforcement of foreign awards under conventions such as those mentioned in Point 2 above, establish that though arbitral awards are binding from the moment they have been rendered, recognition or enforcement may be refused by the courts of the country of enforcement if they have been set aside or if their enforcement has been suspended by a decision of the courts of the country of rendition. Nevertheless, such possibility seems to have been substantially reduced in practice by the fact that, as indicated in Point 1 above, the wide adoption of legislation such as UNCITRAL's Model Law in different national fora or legislation inspired by its principles naturally leads to a reduction of controls on awards available in the country of rendition and thus minimize the possibility that such awards be set aside or its enforceability suspended in such country. On the other hand, courts in certain national jurisdictions (see for example, Sweden and France) have decided on the basis of Article VII of the 1958 New York Convention or on other grounds that a foreign award set aside abroad may be enforced in the forum if otherwise satisfying such forum's requirements for the enforcement of awards rendered in connection with international commercial arbitration disputes.<sup>17</sup>

*Point 4:* For the above reasons, many BITS and minilateral and multilateral arbitration treaties provide that the consent to arbitrate from the host country enshrined in the treaty and the specific consent from the private investor to submit the dispute to arbitration given prior to or concomitant with the filing of the arbitration request shall satisfy the requirements applicable to arbitration agreements under, for example, the 1958 New York Convention, or the 1975 Panama Inter-American Convention (see NAFTA Chapter 11, Article 1122(2); Article VII (4)(b) of the Argentina–United States BIT; Section 5 of MAI Draft, p. 63). Furthermore, in order to ensure that the provisions of such conventions for the recognition or enforcement of arbitral awards shall apply at least in the

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<sup>17</sup> See J. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 The ICC International Court of Arbitration Bulletin, 1998, at 14–31.

world-wide network of countries having ratified them, BITs and other international agreements regarding foreign investment protection require that the arbitral award be rendered in a country having ratified, one or more such conventions, as the case may be, and that claims under such investment treaties fall under the subject-matter covered by such conventions and authorize the applicable disputing party to seek enforcement of such award under any such conventions within their respective territorial sphere of application (see NAFTA Chapter 11, Articles 1130, 1136(6) and (7); Article VII(5) of the Argentina–United States BIT; Section 18 of the MAI Draft, p. 68).

## B. MAIN INTERNATIONAL ARBITRATION OPTIONS IN INTERNATIONAL AGREEMENTS REGARDING FOREIGN INVESTMENT PROTECTION

### 1. THE UNCITRAL ARBITRATION RULES

The UNCITRAL Arbitration Rules (the UNCITRAL Rules) is the more current *ad hoc* commercial arbitration option found in BITs and minilateral, plurilateral and multilateral international agreements on the resolution of investment disputes.

In general terms, *ad hoc* arbitration implies that the proceedings are conducted without any supervision or support from a specialized institution which would be charged with taking certain measures aimed at permitting the carrying out of the arbitration within the self-contained framework of the arbitration rules provided by the institution, that is to say, with no interference of State courts. In the case of institutional arbitration, the institution is normally in charge of a number of tasks, such as selecting, appointing or confirming arbitrators, taking care of the financial aspects of the arbitration, such as the fixation of the advance on costs to cover administrative and arbitral fees, the negotiation of fees with the arbitrators or the fixation of these and other fees and cost advances on the basis of pre-ordained scales, the determination of such fees and of the administrative fee at the end of the arbitration, deciding on challenges against or replacement of arbitrators, generally supervising the integrity of the proceedings and even scrutinizing the draft award or providing for the appointment of a panel to decide on the annulment of an award having violated certain requirements set forth in the applicable arbitral rules. It is currently held that the quality controls exercised by major arbitral institutions primarily when choosing arbitrators or, in the case of the ICC system, also when scrutinizing draft arbitral awards, and their proven track record when supervising arbitral proceedings accounts for the judicial deference for institutional arbitration when it comes to enforcing arbitral orders, determinations or awards.<sup>18</sup>

Additionally, experienced international arbitral institutions follow, on a day-to-day basis, the proceedings and their pace and are instrumental in clarifying doubts that may

<sup>18</sup> See G. Aksen, *Ad Hoc versus Institutional Arbitration*, 2 The ICC International Court of Arbitration Bulletin, 1991, at 8–14.

arise at the level of the arbitrators and the parties as to the interpretation of the applicable arbitration rules, as well as to explaining how to overcome certain procedural hurdles that may arise. If needed, the attention of the arbitrators may also be drawn to the delays provided in the rules that should be respected and fast-track or accelerated arbitral proceedings may be facilitated.

The UNCITRAL Rules *per se* do not bring about the intervention of any support or administered institution. Therefore, the type of help and supervision that is available under institutional rules does not, in principle, exist unless the parties introduce through their stipulations additional support for helping to administer the application of the UNCITRAL Rules (for instance, by agreeing on an appointing authority). In fact, the ICC may act as appointing authority in respect of arbitrations conducted under the UNCITRAL Rules and has specific rules to such effect.<sup>19</sup> One of the advantages mentioned in favour of *ad hoc* arbitration, including the UNCITRAL Rules, is that it would be less expensive since it does not require the payment of any administrative fees to compensate for the Institution's services. However, the payment of such fees within the context of an institutional arbitration brings in the additional, and not insignificant, value of supervisory and support services provided by the institution itself. On the other hand, it is a generally accepted fact that the more substantial costs involved in an international arbitration are lawyers' or counsels' fees rather than the fees paid to an arbitral institution for its services or to arbitrators designated according to an arbitral institution's rules.

Furthermore, the very fact that there is no institution administering the arbitration may bring about negative economic and financial consequences. Unlike most institutional arbitration rules, the UNCITRAL Rules do not have any fee scales attached to them that would apply to calculate cost advances and arbitral fees. Therefore, it is for the parties to an arbitration conducted under the UNCITRAL Rules to directly handle, negotiate and agree among themselves and with the arbitrators, arbitral fees issues, advances on costs, and the date of payment of fee advances and final fees. This type of negotiation may give rise to delays in the commencement and normal development of arbitral proceedings and lead to potential friction between parties and arbitrators. The parties may be forced to accept economic conditions they would not have otherwise been exposed to within the context of institutional arbitration. For example, should the arbitral panel decide in the course of the arbitration that an increase in the cost advance or that an advance on fees is needed, and should payment of such increase or such advance not be made in full by the parties or any of them as and when required, if the arbitrators refuse to continue their work the arbitration may be stalled. Under institutional rules, according to which the institution would be called upon to determine cost advances, fee advances and fees, there is no possibility for the arbitral tribunal to utilize its position to its economic or financial advantage.

The UNCITRAL Rules do not identify the entity or person to act as appointing

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<sup>19</sup> See *Guide to ICC Arbitration*, ICC Publication No. 448 (E), 1994, at 51–52.

authority, or the authority which is to appoint arbitrators on behalf of the party which has failed to do so and the authority that eventually may be also called upon to decide on the challenge or removal of arbitrators. If the parties have failed to identify such appointing authority, Article 6(2) of the UNCITRAL Rules provides that any party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority which would fulfill such functions. This may, of course, be a reason for additional delays that would not occur had institutional arbitration been chosen, since arbitral institutions directly and immediately play the role of deciding issues concerning the appointment and removal of arbitrators.

Within the context of minilateral or plurilateral treaties regarding foreign investment, some of these problems have been alleviated or resolved where the UNCITRAL Rules apply within the context of the treaty (e.g. because they have been chosen by the private claimant) to an arbitration commenced thereunder. Such is the case of NAFTA Chapter 11 and of the Treaty of Three Chapter XVII. Since their provisions are very similar, the following will only refer to NAFTA Chapter 11 provisions. The Secretary-General of ICSID will act as appointing authority should a party fail to appoint an arbitrator or the disputing parties be unable to agree on a presiding arbitrator and the UNCITRAL Rules (Article 1124). It will be also for ICSID's Secretary-General to appoint the members of the tribunal acting under the UNCITRAL Rules eventually called to decide on the consolidation of arbitral proceedings and to conduct the unified proceedings (Article 1125). It should be borne in mind, of course, that ICSID's Secretary-General will play the same role should such appointments become necessary if the private investor had opted for ICSID Convention or ICSID Special Facility arbitration as also permitted by NAFTA Chapter 11. Under the UNCITRAL Rules, such appointing authority would decide on any challenges against the challenged arbitrator (Article 12(2)). Also, the schedule of fees of such appointing authority, if any, will be utilized for determining arbitral fees (Article 39(2)). Nevertheless, other traits described above that may still be perceived as disadvantages inherent in *ad hoc* arbitration mechanisms such as the UNCITRAL Rules, like the absence of institutional support and supervision in the course of arbitral proceedings, may still remain even within the context of, say, NAFTA Chapter 11 or the Treaty of Three Chapter XVII.

## 2. ICSID ARBITRATION

Another of the dispute resolution options currently contemplated in BITs and in minilateral or multilateral international agreements providing private investors with direct access to international commercial arbitration for deciding disputes against a host State is ICSID arbitration. Actually, this option is only open, as stated before, when the State party to the dispute and the State of the private disputing party are States having ratified the ICSID Convention. Other limitations concerning the disputes susceptible to

being decided through the ICSID Convention or ICSID Additional Facility arbitration have been already considered in this article.

Arbitrations under the ICSID Convention are governed by the Convention's rules and principles and by any procedural rules issued by ICSID. It is a form of institutional arbitration governed by an international treaty that isolates or detaches the arbitral proceedings and the award from any national legal system, including the laws of the country where the arbitration takes place. An ICSID Convention award is not subject to any means of recourse or for setting it aside before national courts of ICSID Member countries (Article 51(1), ICSID Convention). It may be only subject to annulment proceedings for certain limited grounds set forth in the ICSID Convention itself (that the tribunal was improperly constituted, that it manifestly exceeded its powers, that one of its members was corrupt, that there was a serious departure from a fundamental rule of procedure or that the award failed to state the reasons on which it is based (Article 51(2)) before an *ad hoc* committee of three members set up by the Chairman of the ICSID Administrative Council, who is also the Chairman of the World Bank. The decisions of such committee, which may annul the award in full or in part, must be reasoned and are final (Article 52(3)). ICSID Convention awards may be also revised by the same panel having made them (or a new panel when referring the award to the old one is no longer possible) if a fact unknown to the tribunal and the applicant when the award was made decisively affects the award (Article 51(3)).

Awards made under the ICSID Convention are not subject to *exequatur* proceedings in any Convention Member country. This means that upon presentation of a copy of the award certified by ICSID's Secretary-General, pecuniary obligations under the award must receive enforcement as if decreed under a domestic court decision of the Member country where recognition or enforcement is sought (Article 54). Nevertheless, matters regarding sovereign State immunity as to enforcement are decided under the laws of the forum where enforcement is to take place (Article 55). By submitting to arbitration under the ICSID Convention, the investor's home State right to exercise diplomatic protection or bring an international claim against a host State *vis-à-vis* the dispute is suspended (Article 27(1)).

Failure to enforce an ICSID Convention award will be a breach of the Convention which may lead to the responsibility of the non-complying State under public international law. In such case, the investor's home State right to exercise diplomatic protection is revived.<sup>20</sup> Nevertheless, under BITs or other international agreements referring to international commercial arbitration for resolving investment disputes (such as NAFTA Chapter 11 or the MAI Draft), failure to enforce *any* arbitral award made under one of the non-ICSID-Convention arbitration mechanisms provided for in such agreements or treaties (such as the ICSID Additional Facility, UNCITRAL Rules or ICC Arbitration Rules) may also lead to the international responsibility of the non-complying Member State since non-enforcement would constitute the latter's breach of

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<sup>20</sup> Article 27(1) ICSID Convention; Parra, *supra*, footnote 1, at 313.

its treaty obligations. However, if the applicable BIT or other international agreement does not provide for the suspension of diplomatic protection from the investor's home State along lines similar to Article 27 of the ICSID Convention, such suspension will not automatically apply if ICSID Convention arbitration is not resorted to in order to resolve any private investor's possible claims. For instance, the Argentina–El Salvador BIT (Article 10(6)) and the Argentina–Chile BIT (Article x(6)) provide that no diplomatic channel discussions or diplomatic protection may be established or exercised by any Member country so long as court or arbitral proceedings shall be underway between the private investor and the host country except when the respective court decision or arbitral award against the host State is not honoured.

In an ICSID arbitration, fees are calculated according to the ICSID Schedule of Fees (1 July 1991). In this connection, it would be appropriate to refer to the words of ICSID's Deputy Secretary-General:

“For ICSID Convention proceedings, the fees set forth in the ICSID Schedule of Fees are, strictly speaking, limits within which arbitrators can determine their fees in the absence of advance agreement on the matter between the tribunal and the parties (see ICSID Convention, Article 60). In practice, in ICSID Convention proceedings, the fees set out in the Schedule of Fees have come generally to be regarded as automatically applicable rates which may be changed if the tribunal and the parties so agree in advance. This is reflected in the drafting of the introductory phrase of the relevant provision of the ICSID Administrative and Financial Regulations (Regulation 14(1)). This practice is also reflected in the Additional Facility Rules. See ICSID Additional Facility Administrative and Financial Rules ... Article 6. Arbitrator fees higher than those specified in the ICSID Schedule of Fees have been agreed upon between tribunals and parties in six proceedings without, however, changing the *per diem* basis for the calculation of the fees ... The fees of ICSID arbitrators are thus calculated on a *per diem* basis rather than on *ad valorem* basis as under the ICC Rules ...”<sup>21</sup>

For reasons explained above in the Introduction and in Part One, there may be cases where neither the ICSID Convention option, nor the ICSID Additional Facility option, may be available under the applicable BIT or international agreement regarding foreign investment protection. Additionally, the private investor or the State party wishing to initiate arbitral proceedings may feel inclined to opt for a different form of institutional arbitration. For example, the private investor may wish to resort to a more supervised form of institutional arbitration or feel uncomfortable with the additional opportunities to attack the award through potential revision or annulment, as permitted for example under Articles 50 to 52 of the ICSID Convention, which would make such annulment decisions immediately and automatically enforceable in all countries party to the ICSID Convention without the need of going through enforcement or recognition proceedings<sup>22</sup> (this latter feature does not apply to ICSID's Additional Facility

<sup>21</sup> See Parra, *supra*, footnote 1, p. 310, notes 111–112.

<sup>22</sup> Article 53(2), ICSID Convention. The consequences of the annulment of an award under the New York Convention, Article v(1)(e), do not have the same extraterritorial effects according to certain interpretations of this provision or if according to Article VII of this Convention a national law or treaty permitting the recognition or enforcement of an award annulled in the country of origin applies.

arbitrations, see Article 3 thereof); or wish to resort to arbitration rules permitting arbitral panels to issue interim measures of protection—under Article 47 of the ICSID Convention, ICSID panels can only recommend such measures if any of the parties objects, though there is evidence that ICSID arbitral panels may be willing to decree such interim measures irrespective of the objection raised by one of the parties. On the other hand, under the ICSID Additional Facility Rules, it is possible for an arbitral tribunal to grant interim measures of protection (Article 47)—or not excluding the possibility of resorting to court-ordered provisional measures;<sup>23</sup> or prefer that the award be exposed to the limited but sophisticated supervision that may be available before the courts of the major national jurisdictions with experience in arbitration matters. It could also be the case that the host State would not like to be subject to an arbitration mechanism providing for an award that may become automatically effective without the need of *exequatur* proceedings, as is actually possible under Article 53 of the ICSID Convention. A host State may also be concerned, as the current literature on ICSID arbitration suggests, with eventual economic pressures originating in the World Bank context should it incur delays or refuse to spontaneously enforce an ICSID Convention or an ICSID Additional Facility 3.

### 3. THE ICC ARBITRATION RULES

On 8 April 1997, the Council of the International Chamber of Commerce meeting in Shanghai, China, adopted new ICC Arbitration Rules which came into effect on 1 January 1998 (the 1998 Rules, or the New Rules). The 1998 Rules—the final product of two years' work—were prepared by the ICC Commission on International Arbitration, in conjunction with the International Court of Arbitration of the ICC (the Court) and also with the input from National Committees of the International Chamber of Commerce from all over the world.

The 1998 Rules (Article 6(1)) apply to arbitrations commenced on or after 1 January 1998, unless the parties agree that the ICC arbitration rules in effect on the date of their arbitration agreement shall apply.

The 1998 Rules maintain the basic features that have characterized the ICC arbitration system since its inception in 1923, that is:

- (i) the pivotal role played by the Court in the administration of arbitrations under ICC arbitration rules in force from time to time throughout more than seventy-seven years of existence, which includes confirming arbitrators and scrutinizing draft arbitral awards as to form and points of substance before being rendered; and
- (ii) the flexibility and universality of the ICC arbitration system permitting ICC

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<sup>23</sup> ICSID Arbitration Rules (unlike other arbitration rules, e.g. ICC Arbitration Rules, Article 23) exclude court-ordered provisional measures unless the parties have agreed otherwise. See Shihata and Parra, *supra*, footnote 9, at 324.

arbitrations to take place in any corner of the world, in any language and against the backdrop of any legal system.

In this sense, the New Rules constitute an evolution rather than a revolution in respect of the current text, that had not suffered any major modification since the last substantial overhaul of the ICC Arbitration Rules in 1975. The New Rules are largely the outcome of the experience gathered by the Court and its Secretariat since then and a response to the needs of users. The New Rules incorporate existing practices, adapt the ICC Arbitration Rules to certain developments in the field, introduce greater flexibility and transparency and reduce or prevent delays in the administration and conduct of ICC arbitrations.

The ICC arbitration system is one of the services rendered to the world's business community by the ICC created in 1919. The ICC is the mouthpiece of world's business interests and initiatives before national and international fora, including more recently the World Trade Organization. It enjoys consultative status at the highest level with the United Nations and its specialized agencies. It has National Committees in over seventy different countries representing the respective local business communities. It also has direct members from countries not having an ICC National Committee.

(a) *The Court*

The Court is an autonomous arbitration body attached to the ICC (Article 1(1), New Rules). Each National Committee of the ICC may propose a member of the Court to be appointed by the ICC Council, the supreme governing body within the ICC (Article 3(3), Appendix I of the New Rules). The Court has, one hundred and two members representing developed and developing countries alike and all cultures and major legal systems. Its multinational and multicultural composition ensures that all viewpoints and approaches are represented in the Court's debates and in the making of the Court's determinations and decisions. Also, being an autonomous body, it carries out its functions in complete independence from the ICC and its organs (Article 1(2), Appendix I, New Rules). The Court members are independent from the National Committees of the ICC, including the one having proposed them for appointment as Court member (Article 1(3), Appendix I; Article 3(1), Appendix II, New Rules). These characteristics ensure the cultural neutrality and openness and the impartiality and independence of the Court in the carrying out of its functions and when discharging its duties. It also confirms the depoliticized nature of ICC arbitration, which is totally free from any governmental or interest-group influence in its operation, organization and decision-making.

The Court itself does not settle disputes (Article 1(2), New Rules). It does not hear the parties to an arbitral dispute nor establish the facts of the case. Its central function is to administer and supervise arbitrations conducted under the ICC Rules of Arbitration, as a result of an agreement of the parties to that effect, by arbitrators chosen by the



parties themselves or appointed, if they would fail to do so, according to the ICC Arbitration Rules. The Court is entrusted with ensuring the application of the ICC Arbitration Rules (Article 1(1), Appendix I, New Rules) so as to exercise appropriate quality controls on the conduct of the arbitral proceedings and the award or awards rendered by the arbitral tribunal. The controls exercised by the Court with the assistance of its Secretariat aim at making the arbitral process and its outcome neutral, impartial and reliable, so as to prompt the parties to spontaneously abide by the determinations and decisions of the arbitral panel and, if need be, to ensure that the arbitral award shall be enforceable at law before national courts (Article 35, New Rules). The Court administers arbitrations concerning international business disputes but will also take care of domestic business disputes if so agreed by the parties (Article 1(1), New Rules).

An ICC arbitrator must be independent from all parties to the dispute, including the one having nominated him (Article 7(1), New Rules) and must also be able and available to conduct the reference (Article 9(1), New Rules). Should any party fail to nominate his arbitrator or should the parties not agree on the sole arbitrator or the chairman of an arbitral panel, he will be appointed by the Court, normally at the proposal of a National Committee of the ICC selected by the Court at the initiative of the Court's Secretariat (Article 8, New Rules). There are no lists of ICC arbitrators and each proposal, nomination and appointment of an arbitrator is done on a case-by-case basis without the help of pre-established lists or rosters. To ensure that every arbitrator is independent from all parties to the dispute he will only be appointed upon having been confirmed by the Court or its Secretary-General (Article 9, New Rules), as the case may be. Though the parties may contract out of the mechanisms for selecting and appointing arbitrators under the ICC Arbitration Rules (Article 7(6), New Rules), they cannot derogate from the cardinal principle that prospective arbitrators must be independent from all the parties and, once appointed, must remain independent throughout the arbitral proceedings. The Court will also determine the number of arbitrators failing a stipulation or agreement between the parties in this respect (Article 8(2), New Rules).

Another basic principle of the ICC arbitration system is that the fixation of advances to cover arbitration costs and expenses (see a detailed explanation of how cost advances are calculated and a practical example in the Annex to this article), i.e. administrative fees to pay for the Court's and its Secretariat's services, arbitral fees and expenses reimbursable to the arbitrators, as well as of such fees or expenses that ultimately will be paid to the arbitrators or to the ICC for the Court's and its Secretariat's services, correspond exclusively to the Court, which will make the respective calculations by applying the fee tables set forth in Appendix III of the ICC Arbitration Rules to the amount of the dispute.<sup>24</sup> The fact that fees and cost advances are essentially determined on the basis of disputed amounts has the advantage of permitting the parties to make

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<sup>24</sup> Further precisions on the handling of cost issues related to ICC arbitration may be found in H. Grigera Naón, *The Appendices to the 1998 ICC Arbitration Rules*, 8 *The ICC International Court of Arbitration Bulletin* 37, 1997.

advance estimates (even before the commencement of the arbitration) of the costs involved and also should discourage frivolous claims that normally lead to delays and superfluous arbitral activity.

Separate fee arrangements between the parties and the arbitrators are contrary to the ICC Arbitration Rules (Article 2(4), Appendix III to the New Rules). This is one of the important advantages of agreeing to ICC arbitration, since the parties and the arbitrators shall not be exposed to potential animosities or painful bargaining that may be associated with discussions or negotiations related to the financial and economic aspects of an arbitration. Direct dealings of the parties in this respect may conspire against the co-operative atmosphere necessary for the proper conduct of an arbitration, and frequently lead to delays in the commencement and the continuation of the reference.

The Court is also charged with deciding any recusations addressed against an arbitrator for his lack of impartiality or independence (Article 11, New Rules). The Court may—after hearing the parties and the arbitrators—also remove on its own initiative an arbitrator who is prevented *de iure* or *de facto* from fulfilling his functions (Article 12(2), New Rules).

When one of the parties questions the existence or the validity or the scope of an arbitration clause or such matters are subject to doubt and one party has not answered the arbitration request, the ICC Court will first consider whether it is *prima facie* satisfied as to the existence of an arbitration agreement under the ICC Arbitration Rules in order to determine, without needing to resort to a national court, if the arbitration may proceed and the file sent to the arbitral tribunal. Decisions of the Court on the existence of an arbitration clause are administrative in nature and its reasons are not communicated. The fact that the Court is *prima facie* satisfied that an ICC arbitration clause may exist does not prevent the intervening arbitral tribunal from finally ruling on the existence or validity of the arbitral clause or the arbitrability of the dispute. If the Court concludes that an arbitration clause may not exist under the ICC arbitration rules, any party retains the right to ask a court of law having jurisdiction whether or not there is a binding arbitration agreement (Article 6(2), New Rules). Though under the New Rules all determinations regarding the *prima facie* existence of an ICC arbitration clause correspond exclusively to the Court, the Secretariat will advise the Court on the parties' respective positions in this respect for it to decide on this matter.

The Court fixes the place of the arbitration when the parties have not agreed on it (Article 14(1), New Rules). This is also a vital function fulfilled by the Court in view of the economic, operational and legal consequences flowing from such a choice or fixation which, among other things, determines the national jurisdiction supervising the conduct of the arbitration and providing for support regarding the enforcement of orders issued or measures adopted by the arbitral tribunal, the means of recourse available against or for setting aside the award, the place where the award has been

rendered (Article 25(3), New Rules) and its enforceability under international conventions, including the 1958 New York Convention on the recognition and enforcement of arbitral awards.

The Court is also charged with approving the Terms of Reference if signed by the arbitrators when one of the parties has failed to do so (Article 18(3), New Rules). This is consistent with another vital principle of the ICC arbitration system, namely, that if one of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure (Article 6(3), New Rules). Nevertheless, non-participation of a party to an ICC arbitration does not release the other party from the burden of arguing and proving its case. In such circumstances, the arbitral tribunal is not discharged of its duty to “establish the facts of the case by all appropriate means” as soon as possible (Article 20(1), New Rules) and to test the arguments and allegations of the participating party against the evidence produced during the course of the proceedings.

The Terms of Reference is a document containing a summary of the parties' claims and counterclaims and defining the issues in dispute. It is based on the claim, answers to the claim and counterclaims filed by the parties and their latest submissions before and during the process of drafting this document, which is carried out by the arbitrators in conjunction with the parties. It has the advantage of helping the parties and the arbitrators to focus, at an early stage of the proceedings, on the controverted issues at stake and the merits of the case. For that reason it helps the arbitral tribunal to avoid the danger of not deciding issues actually submitted to it or of omitting to decide questions the parties wanted it to decide, and the parties are aided in assessing their respective strengths and weaknesses and eventually to settle their dispute. State parties to ICC arbitration have often praised the Terms of Reference as a means of circumscribing and clarifying the issues to be decided and facilitating settlement.

Only after the Terms of Reference have become effective may the actual arbitral case be tried. In other words, it is only in the post-Terms of Reference stage that parties and witnesses may be heard or summoned as to the merits of the dispute, evidence produced, hearings held, expert evidence proposed and provided for, etc. Thus the Court's powers to approve Terms of Reference and permit the case to advance to the post-Terms of Reference stage, despite the sabotaging tactics of a recalcitrant party or the lack of co-operation of the party absent from the proceedings, are of vital importance.

Last, but certainly not least, the Court scrutinizes the arbitral award in draft form both as to form and points of substance before approving it and having it communicated to the parties. The purpose of this control is both to ensure the quality of the final product of an ICC arbitration and to render it enforceable at law (Article 27, New Rules). The Court does not act as an appeal or review board. It does not have the power to set aside or annul the award.

All ICC awards are binding on the parties. By agreeing on ICC arbitration, the

parties are not only deemed to have submitted themselves *ipso facto* to the ICC Arbitration Rules but also undertake to carry out any award without delays and waive any means of recourse in so far as such waiver can be validly made under the applicable law (Articles 6(1) and 28(6), New Rules). Thus, ICC arbitral awards are final in the sense that except for the possibility of being rectified in case of clerical errors or of being interpreted by the same arbitral panel having rendered them (see Article 29 of the New Rules) they are not open to any appeal or annulment procedures except to the extent imposed by mandatory provisions of the applicable *lex arbitrii*. This is certainly another reason why the scrutiny of the award is of such vital importance within the context of the ICC arbitration system. Whilst the arbitral tribunal has the obligation to modify its award according to the Court's remarks or indications regarding matters of form, it is free to follow or not the Court's remarks as to points regarding the arbitral decision on the merits. These latter remarks do not in any way compromise the freedom and independence of the arbitrators to decide on the merits of the case. Remarks as to form are aimed at ensuring that the award shall not present defects jeopardizing its validity or enforceability. Their objective is to clear up any mathematical or clerical errors incurred in the making of the award, to help identify and eliminate incoherences or contradictions in the reasoning of the arbitrators, and to ensure that the award decides all—neither less nor more—of the questions or issues submitted to the arbitral tribunal (*infra petita, plus petita*), that is to say, the Terms of Reference and the mandate to the arbitrators have been complied with. A draft award not modified to satisfy the Court's observations as to form shall not be approved by the Court and may not become an ICC award.

The guarantees provided by the Court's supervision of arbitral proceedings as to independence, neutrality and respect of due process as well as to the quality of arbitral awards, account for the fact that ICC arbitration is often resorted to by the developing country party to the dispute and that ICC arbitral awards favourable to the developing country claimant often have been enforced against the defendant by the court's of the developed country of which such defendant is a national.<sup>25</sup>

#### (b) *The Court's Secretariat*

The Secretariat of the Court is composed of approximately fifty persons, at present including twenty-two lawyers or holders of law degrees. As multicultural, depoliticized, free from governmental and interest-group influences and multinational as the Court itself, several different languages are spoken in the Court's Secretariat, including Arabic and Cantonese. It is headed by a Secretary-General assisted in his functions by a Deputy Secretary-General and a General Counsel. The Secretariat's fundamental role is to assist the Court in the performance of its functions (Article 2, Appendix I to the New Rules).

<sup>25</sup> See H. Grigera Naón, *ICC Arbitration and Developing Countries*, 8 ICSID Review, Foreign Investment Law Journal, 1993, at 116.

Not only are the Secretariat's ICC arbitrations commenced by the filing of the arbitration request, attached copies and documents with the Secretariat (Article 4(1), New Rules), but also all notifications until the file has been transmitted to the arbitral tribunal are made by or through the Secretariat of the Court.

The Secretariat at present comprises seven teams, each led by a Counsel holding a law degree. When an arbitration request is filed, the Secretary-General will assign the case to one of the seven teams. As from then, such team will be in charge of the administration of the case. Each time the Court has to take a decision or make a determination in the exercise of its powers under the ICC Arbitration Rules, it does so on the basis of an agenda prepared by the Secretariat, which provides the Court with the legal and factual context within which to adopt its decision. Normally, such agendas include recommendations as to the decisions to be taken or the course of action to be adopted by the Court in connection with the different issues arising out of the cases submitted to ICC arbitration. Such agendas treat matters as diverse as the confirmation and appointment of arbitrators, the selection of National Committees of the ICC to be invited to make proposals for appointing arbitrators, the financial and economic aspects of the case (determination of cost advances and arbitral and administrative fees), joinder of arbitral cases, *prima facie* existence of ICC arbitration clauses, the fixation of the place of arbitration, the recusation or removal of arbitrators, the prolongation of delays to finalize the Terms of Reference and render the final award, the approval of Terms of Reference, and the approval of awards submitted in draft form to the Court. One of the central duties of the Secretariat is then to analyse and study different aspects of the case and assist the Court in the ensuing decision-making process.

Another vital duty of the Secretariat of the Court is to serve as the interface between the arbitral tribunal and the parties on the one hand and the Court on the other. As indicated before, the Court does not settle disputes or have any immediate contact with the parties or the arbitrators. The Court's Secretariat, on the contrary, from the beginning of the case is in direct contact with the parties, the arbitrators and the National Committees of the ICC. In general terms, besides keeping the Court informed about the pace and other aspects of the conduct of arbitrations under the ICC Arbitration Rules, it is a source of information for parties and arbitrators on matters related to the understanding of the ICC Arbitration Rules and the way they operate. Without compromising its strict neutrality, the Secretariat of the Court does this through direct exchanges with the parties and the arbitrators or through notes and other documents issued by the Court's Secretariat, with the approval of the Court, for the information of parties and arbitrators or as necessary for the proper conduct of arbitral proceedings (Article 5(2), Appendix II to the New Rules).

(c) *The Conduct of Arbitral Proceedings*

In general, the organization of ICC arbitral proceedings is left to the parties and the

arbitrators. The ICC Arbitration Rules are detached from any national procedural law. When silent, the arbitral panel shall apply the procedural rules stipulated by the parties, or if the parties failed to do so, those determined by the arbitral tribunal itself, which may do so without necessarily referring to the rules of procedure of a national law (Article 15(1), New Rules). The ICC Arbitration Rules are flexible and universal but entrust the arbitrators with sufficient powers to adopt a pro-active approach to the conduct of the arbitration, closer to the inquisitorial system characteristic of continental law. For that reason, the ICC Arbitration Rules provide that ICC arbitrators have the duty to establish the facts of the case by all appropriate means, may on their own initiative summon the parties and witnesses (though at the request of any party they *must* hear the parties), dispose the production of evidence, including expert evidence, and order any party at any stage of the procedure to forward additional evidence (Article 20, New Rules). They may also exclude the production of certain evidence and, within the limits traced by the parties, determine the way in which parties and witnesses shall be heard and questioned and the powers of the panel to establish limitations as to the length of hearings and interrogatories. Unless otherwise requested by any of the parties, they may decide on documents only. ICC arbitrators must state the reasons upon which their award is based (Article 25(2), New Rules) and can only decide as *amiable compositeurs* or *ex aequo et bono* if so expressly authorized by the parties (Article 17(3), New Rules). ICC arbitrators may, at the request of a party, order any interim or conservatory measures they deem appropriate either in the form of a procedural order or a partial award. Notwithstanding the foregoing, even after the file has been transmitted to the arbitral tribunal, any party may apply to a national judicial authority for interim or conservatory measures without thereby repudiating the arbitration clause (Article 23, New Rules).

(d) *The Internal Harmony of the ICC Arbitration System*

The ICC international arbitration system is based on a number of carefully crafted balances or compromises whose implementation largely depends on the wisdom and experience of the Court and arbitral tribunals conducting arbitrations under the ICC Arbitration Rules. Such compromises and balances have been of paramount importance for ensuring the efficiency and effectiveness of ICC arbitrations at both the level of the conduct and supervision of arbitral proceedings governed by the ICC Arbitration Rules, and for securing the spontaneous compliance with or, exceptionally, the compulsory recognition and enforcement of ICC arbitral awards.

The ICC Arbitration Rules maintain a careful balance between, on the one hand, the freedom of the parties to structure their arbitral proceedings as they think it more appropriate and, on the other, the presence of certain heteronomous provisions or principles ingrained in the rules the parties and arbitrators have to abide by as a result of the fact that the arbitral proceedings are governed by the ICC Arbitration Rules. Consequently, there are a number of features of the ICC arbitration system that may not

be contracted out by the parties and which may prompt the Court, if the parties have indicated that such features shall not apply, to decide that there is not “an arbitration agreement under the Rules” in the sense of Article 6(2) of the New Rules which would lead the Court to inform the parties that the arbitration cannot proceed. Among such mandatory features one should mention the powers of the Court and the Court’s Secretary-General to confirm arbitrators in order to make sure that they are independent, able and available to conduct the reference (Articles 7(1), (2), (3) and (4), 9(1) and (2), New Rules), to decide on a challenge of an arbitrator, or to remove and replace an arbitrator not independent or not impartial or not being *de iure* or *de facto* in the position of fulfilling his obligations as such (Articles 11 and 12, New Rules); the Terms of Reference (Article 18, New Rules) or the Court’s powers regarding the scrutiny of awards (Article 27, New Rules). Features that can be clearly contracted out by the parties are any of the provisions of Articles 8 to 10 of the New Rules regarding the number of arbitrators, the nomination and appointment of arbitrators and multiple-party arbitration (Article 7(6), New Rules). But if ICC arbitration is one of the dispute settlement options contemplated in an international foreign investment protection agreement, it is also possible that certain provisions of the ICC arbitration rules be excluded, superseded or complemented by provisions in such international agreements. Such may be the case, *inter alia*, of provisions in such agreements providing for consolidation of arbitral proceedings, limiting the powers of arbitral panels to grant injunctive relief or interim measures of protection, or certain remedies, setting forth special venues and means for the setting aside of awards, permitting the intervention, on an *amicus curiae* basis, of non-parties to the arbitration, introducing rosters for the selection of arbitrators.

The ICC Arbitration Rules also offer guidelines aimed at permitting the arbitral panel and the parties to strike an appropriate balance between the powers of the panel to conduct the arbitration and the rights of the parties in the course of arbitral proceedings. Article 15(2) of the New Rules provides that in all cases the arbitral tribunal shall “ensure that each party has a reasonable opportunity to present its case”. Accordingly, though each party is certainly entitled, as it may be deduced from the remaining text of that very provision, to be treated in a fair and impartial way, which in part means that the parties should be treated similarly in similar circumstances, none of them may expect to have unlimited opportunities to be heard, produce evidence or make submissions. The rights of the parties must be weighed against the necessary powers needed by an arbitral tribunal to discharge its duties and conduct the arbitration efficiently and in a cost-effective way. Also for this reason other provisions in the ICC Arbitration Rules vest arbitrators with certain discretionary powers to conduct the reference, such as Article 20(1) and (6) of the New Rules referred to above, or Article 21(3) of the New Rules indicating that the Arbitral Tribunal “shall be in full charge of the hearings”. Certainly, the exercise of such powers by the arbitral tribunal may not be abusive or oblivious of the need of conducting the reference in a way leading to an

award susceptible to receiving legal sanction. An imprudent decision depriving a party of its opportunity to be heard, or to offer evidence in support of its case which is not superfluous or cumulative with evidence already produced, may lead to the setting aside or the non-enforcement of the award.

Finally, the ICC Arbitration Rules also establish a balance between, on the one hand, the a-national nature of ICC arbitration proceedings and the freedom of the parties to fashion such proceedings within the limits permitted by such rules, and on the other the parties' expectations that the award shall receive legal sanction.

There are different provisions that express the autonomous nature of ICC arbitration. Article 15(1) of the New Rules indicates that the proceedings before the arbitral tribunal shall be governed by "these Rules" and subsidiarily by those fixed, in that order, by the parties and the arbitral tribunal, "whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration". As mentioned before, Article 6(1) of the New Rules establish that the parties "shall be deemed to have submitted *ipso facto* to the Rules" when they have agreed to submit to ICC arbitration. Article 7(5) makes clear that "by accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules." No less explicit is Article 28(6) of the New Rules, also referred to above, stating that ICC awards are binding on the parties and that by submitting the dispute to ICC arbitration the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse in so far as such waiver can be validly made. The provision regarding the criteria for fixing the rules of law governing the substance of the dispute are equally detached from any national legal system or any specific choice-of-law methodology, and also give the parties and the arbitrators sufficient freedom to establish directly the substantive national or a-national legal rules they deem appropriate to govern the dispute without resorting to a conflict-of-laws reasoning (Article 17, New Rules).

However, limitations on such autonomy may be found in the requirement that ICC awards should be enforceable before national courts, that is embodied in or underlying different provisions of the New Rules. The fact that the waiver contained by Article 28(6) regarding means of recourse does not extend to those which may not be waived under the applicable procedural law is already an indication in that sense. Similarly, Article 35 of the New Rules exhorts ICC arbitrators and the Court to "make every effort to make sure that the Award is enforceable at law" and Article 6 of Appendix II to the New Rules provides that the Court is to consider "to the extent practicable" the mandatory law at the place of the arbitration. The most likely opportunities afforded by the ICC Arbitration Rules for the Court to undertake such efforts are probably (but not limited to) when the Court is to make decisions on the confirmation or appointment of arbitrators, on their challenge or removal, when allowing an incomplete arbitral panel to render an award in a "truncated" arbitral tribunal scenario (Article 12(5), New Rules) or on the approval of draft awards. These provisions also call for a delicate balance to be



struck between the autonomous nature of the ICC arbitration system *vis-à-vis* the national legal orders and the unavoidable need to ensure its effectiveness and efficacy despite the fact that arbitral panels are deprived of *imperium*.

(e) *ICC Arbitration involving State Parties*

The ICC arbitration system has had long experience in handling State party arbitrations. In the past few years, despite growing privatization trends and free-market-oriented State economic policies that have reduced the role of States as economic operators, State parties acting as claimants or respondents in ICC arbitrations represent approximately 10 percent of the parties to ICC arbitrations filed each year.

For that reason, historically ICC arbitral awards have evidenced or heralded important trends regarding State contract arbitration in connection both with procedural and substantive law aspects concerned by such type of arbitration. Thus, ICC arbitral decisions regarding State contract disputes have significantly contributed to the creation of a balanced framework for the resolution of such disputes based on principles of fairness, good faith and a thorough consideration of the economic and other realities involved.

For example, an ICC award has concluded that an agreement between a State and a foreign private party, according to which the latter is entitled to certain payments, is not a treaty under public international law—since it does not involve States acting in their sovereign capacity on both sides—and thus does not require legal approval through a legislative enactment from the State party to become valid and effective, irrespective of how the agreement is designated or named and even if it contains a stipulation providing that it is governed by general principles of law under Article 38 of the Statute of the International Court of Justice.<sup>26</sup> Other ICC awards, on the basis of the *Kompetenz-Kompetenz* powers of ICC arbitrators to decide on their own jurisdiction, have decided that international public policy is strongly opposed to conduct pursuant to which a State organ which, when dealing with foreign private parties, enters in an open and international manner into an arbitration clause on the basis of the trust of such parties negotiating in good faith, but which either in the course of arbitral proceedings or when enforcing the award, reneges on its word and avails itself of the nullity of its own undertakings. These awards advance the principle that the State party has a good faith duty to disclose to the other party the legal requirements to be satisfied for its engagements to become binding, including legal or administrative procedures or approvals.<sup>27</sup> ICC arbitration awards have also refused the sovereign immunity defence raised by a State on the argument that the sovereign immunity theory could not apply either under national or public international law when the sovereign State was not submitting to the State courts of another State and also because it would imply ignoring

<sup>26</sup> ICC Award in Case 3327 of 1981, I Collection of ICC Arbitral Awards 433, 1990.

<sup>27</sup> ICC Award in Case 1939 of 1971. See references in I Collection of ICC Arbitral Awards 222, 251 and 284, 1990; ICC Award in Case 4381 of 1986, II Collection of ICC Arbitral Awards 263, 1994.

the authority of arbitrators, which rests upon stipulations of the parties referring the dispute to arbitration and which, being of binding nature, constitutes a waiver of immunity. The notion of sovereign immunity would be also alien to the notion of voluntary submission to arbitration, since it is based on the idea of preserving the equality of States, which is not affected when submitting to a private arbitration tribunal, which is not a State administrative or judicial authority.<sup>28</sup> ICC arbitration awards have also given effect to stabilization clauses agreed by the parties when such is the conclusion to be reached on the basis of the combined application of different clauses in the same contract referring to a national law and general principles of law and if the purpose of such clause was to avoid the risk of a unilateral modification by the State of the State party of its laws, thus disrupting the contractual equilibrium relied upon by the parties when entering into the transaction.<sup>29</sup>

ICC arbitration awards have also been sensitive to the special realities or circumstances affecting State parties or to their positions. For example, in a case involving a developing African State party to a mineral exploration contract with a German private party, the Arbitral Tribunal found that in view of the technical inequality between the State party and the private party, the latter, being in possession of the necessary technical expertise, had the duty to share it with the State party for it to be able to evaluate the rights and obligations actually undertaken under the contractual agreements being considered and to refrain from exerting pressure on the State party to force it into the contract, without allowing the developing State to seek or find proper advice. Those duties on the part of the private party are particularly important when—as was the case—the contractual relationship could be characterized as an international economic co-operation agreement. In such a context, the generally accepted principle of law imposing the obligation to act loyally in contractual agreements is of essential importance within the context of international economic relationships. For this reason, the presumption of equality between contracting parties does not apply when one of them lacks appropriate technical expertise and the party possessing it does not properly disclose relevant aspects of a technical nature.<sup>30</sup>

ICC awards have been also careful to properly consider the particular legal framework defining a role of States when executing contractual agreements. For instance, a recent ICC award decided that the fact that a State representative signs a contractual agreement on behalf of a State does not bind the State as a party to the contract if such representative's signature has been affixed below the legend "approved and endorsed" though such representative has also separately signed the contract on behalf of the State oil company of such State. The Arbitral Tribunal concluded that when signing on behalf of the State, the representative was not engaging it as a party to

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<sup>28</sup> Award in ICC Case 2321 of 1974, I Collection of ICC Arbitral Awards 8, 1990. More recently in the same sense, ICC Award in Case 8035 of 1995, 4 *Journal de Droit International* 1040, 1997.

<sup>29</sup> Award in ICC Case 3380 of 1980, I Collection of ICC Arbitral Awards 412, 1990.

<sup>30</sup> Award in ICC Case 5030 of 1992, III Collection of ICC Arbitral Awards 475, 1997.

the contract but was only expressing such State's authorization for its State oil company to be bound by the contractual provisions.<sup>31</sup>

It should be also noted that in the context of ICC arbitrations, developing States do plead the application of general principles of law, including general principles on international contractual obligations, such as the Unidroit Principles of International Commercial Contracts, and that their pleadings may be crowned with success, as proved by a recent ICC award.<sup>32</sup> This suggests that when arbitrating within the ICC context, State parties are confident that a fair and just decision of disputes may be obtained even if not necessarily or exclusively based on the application of their national law.

### PART THREE: *Conclusions*

Current trends indicate that international commercial arbitration is the most favoured non-judicial dispute resolution alternative available in the different international agreements or treaties regarding foreign investment protection. As the number of such treaties and agreements, as well as the substantive matters covered by them, are likely to expand, one should expect that the importance of international commercial arbitration for the resolution of foreign or international investment disputes between the host country and the foreign investor will grow accordingly.

One of the main advantages of international commercial arbitration, together, *inter alia*, with its neutrality and specialization, is its flexibility and ability to adapt to the specific traits of each discrete dispute. It has been said that each arbitration is held within a microcultural environment determined by the characteristics of the parties and the dispute.<sup>33</sup> Such flexibility should permit the panel and the arbitral proceedings to be tailor-made in agreement with such environment. Experience shows that when such an objective is attained, the arbitral proceedings develop more swiftly and the chances of a spontaneous enforcement of the ensuing award by the losing party are enhanced, since the parties rely upon the neutral and evenhanded nature of the process and are favourably predisposed to abide by its outcome when they perceive that the process is fair and efficient. Nothing has been better adapted to meet the varying demands posed by the settlement of foreign investment disputes.

Though the importance of *ad hoc* arbitration options may not be denied, international institutional arbitration, by providing the support of an international, culturally neutral, experienced and specialized body, entrusted in varying degrees according to the different institutions with powers to supervise and organize the proceedings and their outcome as well as to help overcoming hurdles likely to stall arbitral proceedings without external interference, appears to be the best adapted to meet the expectations of host States and private investors alike regarding the

<sup>31</sup> ICC Award in Case 8035 of 1995, referred to *supra*, footnote 28.

<sup>32</sup> See, for example, award rendered in ICC Case 7110 of 1995, 10 The ICC International Court of Arbitration Bulletin 39, 1999.

<sup>33</sup> See J. Paulsson, *Different Approaches to International Arbitration Procedures*, 17, 19 ADR Currents, Fall 1996.

independence, expediency and efficacy of arbitral proceedings for settling foreign investment disputes.

Within the context of international agreements on investment protection, such objective is also furthered by permitting disputing parties to choose among different and reputable arbitration facilities; as it has been shown to some extent in this study, each arbitration facility has its own individuality and offers what may be characterized as a different “product”. Permitting private and State disputing parties to make informed choices under agreements for the protection of foreign investment regarding the settlement of disputes through international commercial arbitration—preferably of an institutional character—can only redound to the benefit of the peaceful and swift resolution of disputes between the private investor and the host country that may arise thereunder, and thus help to settle this type of dispute within a neutral, efficient, effective and depoliticized framework, which invariably is one of the paramount objectives of such agreements. It is also such a framework, as contended in this article, which is at present the most appropriate for permitting the proper application and development of existing, incipient or new rules and principles on foreign investment protection enjoying or aspiring to enjoy wide international consensus.

### *Annex*

#### THE COSTS OF ICC ARBITRATION

##### *Advance on costs: who pays?*

The advance on costs is payable in equal shares by the Claimant and the Respondent. In certain circumstances, the Court may fix separate advances in respect of a principal claim and a counterclaim. A provisional advance intended to cover the costs of the arbitration until the Terms of Reference has been drawn up may, however, be requested from the Claimant. The amount of this provisional advance will be credited to the Claimant's share of the advance on costs.

Payment is staggered as follows:

- US\$ 2,500 is payable with the Request for Arbitration;
- after a review of the Request, the Secretary-General may request the Claimant to pay a provisional advance;
- as soon as practicable, the Court fixes the advance on costs to be paid in equal shares by Claimant and Respondent (the amount of the provisional advance that has already been paid, which includes the initial US\$ 2,500, is credited to the Claimant's share).

If the Claimant or the Respondent pays its share and the other refuses to pay, the former will be invited to pay on behalf of the latter. A party that has already paid in full its share of the advance on costs may pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.

The fees of the arbitrators and the ICC administrative costs are fixed by the Court at the end of the proceedings. In its Award the Arbitral Tribunal decides which of the parties shall bear the costs of the arbitration or in what proportions the costs shall be borne by the parties.

*Advances on costs: examples*

The following examples are given for illustrative purposes only, and do not bind the ICC Court.

*Example 1*

The total amount of claims and counterclaims is US\$ 1,000,000; the controversy is to be settled by a sole arbitrator.

The advance on costs might be fixed as follows:

– administrative expenses	US\$ 16,800
– arbitrators estimated fees (minimum US\$ 11,250/maximum US\$ 53,500)	US\$ 32,375
– expenses (travel, hotel, meeting rooms, etc.)	US\$ 4,825
TOTAL	US\$ 54,000

To sum up, for a dispute of one million dollars, settled by a single arbitrator, the advance on costs may amount to some US\$ 54,000, that is: 5.4 percent of the amount in dispute.

*Example 2*

The total amount of claims and counterclaims is US\$ 25,000,000; the case is to be settled by three arbitrators:

The advance on costs might be fixed as follows:

– administrative costs	US\$ 42,800
– arbitrators's estimated fees (US\$ 98,875 × 3) (per arbitrator: minimum US\$ 36,250/maximum US\$ 161,500)	US\$ 296,625
– expenses (travel, hotel, meeting rooms, etc.)	US\$ 15,557
TOTAL	US\$ 355,000

To sum up, for a dispute of 25 million dollars, the advance on costs may amount to US\$ 355,000, that is: 1.4 percent of the amount in dispute.

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